Petition

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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

WILSHIRE OIL COMPANY OF TEXAS,

Petitioner,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Questions Presented

1. Whether the court of appeals acted outside its constitutional powers, and inconsistently with decisions of this Court, in refusing to apply the plain and unambiguous language of § 2(c) of the Bank Holding Company Act, 12 U.S.C. § 1841(c), which defines the term "bank" and thus establishes the basic scope of that Act.

2. Whether the court of appeals erred in holding that § 5(b) of the Bank Holding Company Act, 12 U.S.C. § 1844(b), authorizes the Board of Governors of the Federal Reserve System to expand the scope of that Act, and enlarge its own jurisdiction thereunder, by prohibiting the existence of companies whose "activities . . . are technically outside the literal terms of the Act."

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BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Wilshire Oil Company of Texas ("Wilshire") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on December 31, 1981, affirming a final decision and order of the Board of Governors of the Federal Reserve System (the "Board"), entered on April 2, 1981.

Opinions Below

The opinion of the court of appeals (1a-19a)* has not yet been reported. The decision and order of the Board (20a-39a) is unreported.

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* Citations in the form "—a" are to the Appendix to this Petition. Citations in the form "A—" are to the Appendix filed in the court of appeals.

Jurisdiction

The judgment of the court of appeals was entered on December 31, 1981(59a). A petition for rehearing, suggesting rehearing in banc, was denied on February 1, 1982 (60a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutes Involved

The statutory provisions at issue in this proceeding are §§ 2(c) and 5(b) of the Bank Holding Company Act of 1956, as amended (the "BHC Act"). Section 2(c) provides in pertinent part that:

> " 'Bank' means any [domestic] institution . . . which (1) accepts deposits that the depositor has a legal right to withdraw on demand and (2) engages in the business of making commercial loans. . . ."

12 U.S.C. § 1841(c) (1976).

Section 5(b) provides that:

> "The Board is authorized to issue such regulations and orders as may be necessary to enable it to administer and carry out the purposes of this chapter and prevent evasions thereof."

12 U.S.C. § 1844(b) (1976).

Statement of the Case

This petition raises stark issues concerning the constitutional principle of separation of powers and fundamental rules of statutory construction established by this Court, as applied to questions of first impression under the Bank Holding Company Act.

In § 2(c) of the BHC Act, Congress provided without ambiguity that no institution may be considered a "bank" under the Act unless that institution "accepts deposits that the depositor has a legal right to withdraw on demand," 12 U.S.C. § 1841(c)(1). In determining that petitioner has violated the BHC Act by continuing to have an interest in a "bank," the Board of Governors of the Federal Reserve System ignored this clear statutory language and substituted its own definition of the term "bank" for that enacted by Congress, thereby vastly enlarging the potential coverage of the Act as well as depriving petitioner and its stockholders of basic rights. In short, the Board substituted its own notion as to what Congress should have said and done for what, in fact, Congress said and did.

This abuse of administrative power was erroneously upheld by the Court of Appeals for the Third Circuit on the theory that the Board was empowered by section 5(b) of the BHC Act to override the Congressional definition specified in section 2(c). The court's conclusion directly conflicts with the fact that where Congress intended to grant the Board power to define further the terms in the statute, it expressly so provided, as in the case of the term "successor" (BHC Act § 2(e)). No such power was granted with respect to the definition of the fundamental term "bank," which, after all, defines the very scope of the BHC Act.

A. Facts

Wilshire is a publicly held corporation organized under Delaware law, with its principal office in Jersey City, New Jersey. Wilshire's business consists of oil and gas production on a modest scale in various locations in the United States and Canada, and of its 90% ownership interest in The Trust Company of New Jersey ("TCNJ").* TCNJ is a

* TCNJ is the only Wilshire subsidiary that is not wholly-owned, and Wilshire has no corporate affiliates or parents.

state-chartered financial institution organized under New Jersey law, with its main office in Jersey City, New Jersey and 18 branch offices in the northern New Jersey metropolitan area adjacent to New York City. The services offered by TCNJ include both lending and deposit-taking activities, in which, reflecting recent trends in the financial industry generally, TCNJ faces direct competition from various types of financial institutions (*see* A80-99, 130-33, 340-42, 360-90).

As a result of the Bank Holding Company Act Amendments of 1970, Pub. L. No. 91-607, 84 Stat. 1760 (December 31, 1970), which for the first time made the BHC Act applicable to companies with only a single bank subsidiary, and of a 1972 decision by the Board,* Wilshire became subject to the provisions of § 4(a)(2) of the BHC Act, 12 U.S.C. § 1843(a)(2), as amended in 1970, and therefore was required, by January 1, 1981, either (i) to cease being a bank holding company, or (ii) to discontinue its non-banking activities. After considering various means of compliance under both alternatives, Wilshire chose to cease being a bank holding company by terminating TCNJ's acceptance of "deposits that the depositor has a legal right to withdraw on demand." ** This change was duly imple-

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* Wilshire's affiliation with TCNJ began in 1967, when it began purchasing TCNJ shares. By the end of 1970, Wilshire had acquired over 50% of TCNJ's shares. Subsequent purchases increased Wilshire's ownership to the current 90% level. In July of 1972, the Board ruled that Wilshire had not by June 30, 1968 acquired adequate "control" of TCNJ to be permitted the exemption from divestiture provided to other one-bank holding companies in existence prior to the enactment of the 1970 Amendments (*see* A263-68).

** One factor brought to Wilshire's attention in this regard was the recent ruling by the Comptroller of the Currency (*see* A278) that the Gulf & Western Company could acquire a national bank without becoming subject to the BHC Act, where the acquired bank

(footnote continued on following page)

mented in November, 1980, by TCNJ's reservation of the right to require fourteen days prior notice of withdrawal from all its depositors. By a letter dated November 3, 1980, the Board was advised of Wilshire's compliance with the BHC Act.

B. Proceedings Below

The Board does not dispute the foregoing facts, but does resist the legal result that the undisputed facts require under the unambiguous language of § 2(c) of the BHC Act.

In response to Wilshire's actions in compliance with the BHC Act, the Board noted its disagreement in a letter of November 28, 1980, and then, on December 9, 1980, commenced administrative proceedings seeking (1) a cease-and-desist order requiring Wilshire to divest a portion of its business, and (2) the imposition of various penalties and forfeitures on Wilshire and on its officers and directors. The Board's actions precipitated procedural disputes and two collateral proceedings between the parties,* which

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(footnote continued from preceding page)

had transferred its commercial loan portfolio to other Gulf & Western subisdiaries and had undertaken not to continue its commercial lending activities. Because the acquired firm no longer was engaged "in the business of making commercial loans", BHC Act § 2(c)(2), 12 U.SC. § 1841(c)(2), it was not a "bank" within the BHC Act definition. (*See* A343-59). In March of 1981 the Board also approved the Gulf & Western transaction, noting, in response to a party who had argued for the opposite ruling on the ground that the change in operations was a "technicality" that purportedly "circumvented" the purposes of the BHC Act, that:

> "The question whether the definition of 'bank' contained in the [BHC] Act should be changed is more appropriately a matter for Congressional consideration . . . ."

American Banker, March 13, 1981, p. 16, cols. 3-4 (A392-93).

* The facts pertaining to those proceedings are set forth in the Appendix filed in the court of appeals (A73-77, A140-41, A239-42, A300-01, A307-25), and are summarized in the recitations of the Wilshire-Board Agreement (40a-42a).

ultimately were resolved by negotiations resulting in the execution, on February 18, 1981, of a detailed written agreement between Wilshire and the Board (the "Wilshire-Board Agreement"), to govern the further course of the proceedings. In the Wilshire-Board Agreement, which was entered as a consent order in the administrative proceedings and incorporated in the Board's final decision and order (40a-58a), the parties agreed that their only dispute was on a question of law, which could be resolved by an abbreviated administrative procedure on direct submission to the Board, without the need for evidentiary hearings:

> "[T]he sole issue between the parties is the legal issue whether TCNJ is a bank under the BHC Act and whether TCNJ's reservation of the right to 14 days' advance notice of withdrawal from deposits at TCNJ caused TCNJ to become a non-bank for purposes of the BHC Act. The parties agree that there are no material questions of fact in dispute that would necessitate an administrative hearing on the issue between the parties." Wilshire-Board Agreement ¶ 1(a) (43a).*

After briefing, the Board on April 2, 1981 entered its final decision and order (20a-39a) determining that TCNJ was a "bank" under BHC Act § 2(c), and that therefore Wilshire was a "bank holding company" and had violated § 4(a)(2) of the BHC Act by maintaining a con-

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* Based upon this understanding, Wilshire agreed to forgo its right to a full evidentiary hearing. (*See* 43a-44a). The Board, however, violated this understanding in its decision and order by purporting not only to make "findings" on disputed issues of fact, but also to attribute legal significance to those unauthorized "findings" (*e.g.*, 25a, 30a-31a, 35a-38a). The court of appeals ignored this unlawful deprivation of Wilshire's due process rights, and indeed compounded it by "affirming" or relying on the improper "findings" as its principal basis for applying § 5(b) of the BHC Act (*e.g.*, 5a, 14a-15a, 18a), thus rendering the decision below infirm on this ground as well.

trolling ownership interest in TCNJ, and ordering Wilshire to "cease and desist" in accordance with the provisions of the Wilshire-Board agreement.

On April 9, 1981, Wilshire filed a petition for review with the court of appeals, whose jurisdiction to review the Board's decision and order was invoked pursuant to § 9 of the BHC Act, 12 U.S.C. § 1848, and § 8(h)(2) of the Financial Institutions Supervisory Act, 12 U.S.C. § 1818 (h)(2). On December 31, 1981, the court of appeals affirmed the Board's order in an opinion that substantially adopted the reasoning of the Board's decision. On January 14, 1982, Wilshire filed a petition for rehearing, suggesting rehearing in banc. That petition was denied without opinion on February 1, 1982.

Reasons for Granting the Writ

This case presents important federal questions of first judicial impression regarding the basic scope and applicability of the BHC Act, and the limits of the Board's authority thereunder, which should be settled by this Court. The court of appeals decided those questions in a manner that conflicts with the principles of statutory construction and administrative agency authority established by decisions of this Court and other circuits and creates grave uncertainties as to the scope of the BHC Act's coverage.

The court of appeals' decision overrides Congressional choice on the basis of a constitutionally prohibited exercise in judicial legislation. The judgment of Congress, unambiguously expressed in section 2(c)(1) of the BHC Act, is that no institution may be considered a bank under that Act if it does not accept "deposits that the depositor has a legal right to withdraw on demand." Yet the decision of the court of appeals creates a radically new power in the

Board to dispense with this definition whenever the Board perceives, on the basis of some indefinite concept of "policy," that the institution in question is of a "type" that Congress supposedly "meant to include" in its coverage under the BHC Act. In judicially conferring such expansive power on the Board to engage in standardless, ad hoc determinations of the limits of its own jurisdiction, the court of appeals repudiates its constitutional role, and invites the abuse to which such power easily leads: the condemnation of yesterday's conduct—undertaken by a company in compliance with and reliance upon the clear language of the governing statute—based upon a perceived violation of a new standard invented today to fit the occasion.

The potential consequences of the decision below are far-ranging. In vacating the studied judgment of Congress, the court of appeals in fact has invented a new rule that would render virtually every depository institution in the United States a "bank" under the BHC Act, and then granted the Board *carte blanche* to determine which of those institutions' existence offends the "purposes" of the legislation. The decision below is a prescription for business uncertainty, arbitrary administrative action, and faithlessness to Congressional will.

I.

In Refusing to Apply the Plain and Unambiguous Language of § 2(c)(1), the Court of Appeals Decided an Important Question of Federal Law in a Way That Contravenes the Decisions of This Court, Usurps the Legislative Power of Congress, and Frustrates the Fair and Rational Administration of the BHC Act.

Section 2(c) establishes the basic substantive coverage of the BHC Act by defining the key term "bank." Only by controlling a "bank," as defined in § 2(c), does a company

become a "bank holding company" subject to the Act.* Reflective of the importance of § 2(c) is the painstaking effort that Congress has devoted to its language: the provision has been twice amended—in each case to narrow and clarify its scope—and totally transformed, since the original enactment of the BHC Act in 1956.

The court of appeals' decision in this case is the first reported judicial construction of the language of § 2(c)(1) of the BHC Act. That language plainly establishes a Congressional judgment that institutions which reserve the right to require prior notice of withdrawal from their depositors are not "banks," and therefore not engaged in "banking," within the meaning of the BHC Act. Without denying this fact—indeed while disclaiming any need to consider it (*see* 9a)—the court of appeals in this case decided that such an institution was nevertheless a "bank." This radical judicial reversal of a clear Congressional choice is contrary to the decisions of this Court, and has a pernicious effect on the administration of the BHC Act.

A. The Court of Appeals Disobeyed This Court's Decisions Regarding Statutory Construction, and Thereby Exceeded Its Judicial Competence

The decision below failed to follow controlling authority that required the court of appeals to apply the express terms of § 2(c)(1) of the BHC Act as written, regardless of a court's or an agency's subjective evaluation of the wisdom of the statutory rule. This Court repeatedly has ruled that statutory language not only is "the starting point in every case" (7a), but also is the ending point of the judicial

* In addition, § 2(c)'s definition of "bank" serves to distinguish between the application of the two major substantive sections of the BHC Act—§ 3, which applies only to "bank" activities, and § 4, which applies only to "nonbanking" activities.

inquiry where, as here, the Congressional words are plain and unambiguous. *United States Railroad Retirement Board* v. *Fritz*, 449 U.S. 166, 176 (1981); *Diamond* v. *Chakrabarty*, 447 U.S. 303, 315, 318 (1980); *TVA* v. *Hill*, 437 U.S. 153, 184-88, 194-95 (1978); *United States* v. *Oregon*, 366 U.S. 643, 648 (1961).

There is no doubt in this case as to the meaning of the relevant statutory language or the legal result required by its faithful application. At no point in these proceedings has anyone—including the court of appeals and the Board—identified any ambiguity in the language of § 2(c)(1), or concluded that TCNJ's reservation of the right to require advance notice of withdrawal has any effect other than to deprive its depositors of the "legal right to withdraw on demand." According to decisions of this Court, the presence of these factors means that "[judicial] powers are exhausted," *Diamond* v. *Chakrabarty*, 447 U.S. 303, 318 (1980),* and "the judicial process comes to an end," *TVA* v. *Hill*, 437 U.S. 153, 194 (1978). The court of appeals departed from these holdings and based its decision on the idea that the express Congressional command—in particular the key words "legal right"—may be rendered void and deemed to be surplusage on the strength of a court's or an agency's value judgment that such language, if applied, may lead to some unarticulated "absurd" or "unreasonable" result. Such a proposition is entirely without supportive precedent, contrary to the decisions of this Court, and inimical to the constitutional separation of powers.

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* "[I]n construing the language Congress has employed . . . our obligation is to take statutes as we find them, guided, *if ambiguity appears*, by the legislative history and statutory purpose. Here, we perceive no ambiguity." 447 U.S. at 315 (emphasis added).

We are unaware of any case, including those relied upon by the court below,* in which the *ratio decidendi* was that a federal court could utterly ignore precise Congressional words—no matter what the purported justification. This Court has held to the contrary. *E.g., TVA* v. *Hill,* 437 U.S. 153, 184 n.29 (1978);** *Ex parte Collett,* 337 U.S. 55, 61 (1949). Here, the court of appeals did not even make a pretense of perceiving ambiguity but merely, on its own initiative, determined that Congress was incapable of stating its true intent and therefore the chosen statutory words were meaningless. *Contra, United States Railroad Retirement Board* v. *Fritz,* 449 U.S. 166, 179 (1981).

In defining the term "bank" for purposes of the BHC Act, Congress has spoken in precise and technical terms. Thus, unlike a case where Congress has enacted broad language, in this case strict judicial adherence to the literal

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* The court below relied principally on Justice Reed's *dicta* in *United States* v. *American Trucking Assn's,* 310 U.S. 534, 543 (1940). (*See* 9a-10a). However, the holding in that case was not based on the view that unambiguous statutory language led to "absurd" or "unreasonable" results, but rather that the key word in dispute—"employee"—was ambiguous and undefined. *See id.* at 545 & n.29. Nor was the word "employee" completely read out of the statute, as the decision here has read "legal right" out of § 2(c)(1) of the BHC Act. Moreover, to the extent that *American Trucking* might be read, as the court of appeals did here, to stand for the proposition that a court may ignore a precisely defined term to reach what it otherwise perceives to be a "reasonable" result, this Court should reassess the continuing viability of that case and its consistency with the more recent cases holding to the contrary.

** *TVA* v. *Hill* is particularly forceful here, because even Justice Powell's dissenting opinion, which contended that the majority's result was "absurd" and "unreasonable," was predicated on the view that the statute at issue was "far from 'plain,' " and could be given an alternative construction "without doing violence to its language." 437 U.S. at 205. Thus, both the majority and the dissenting opinions in *TVA* v. *Hill* agreed that unambiguous statutory language must be applied by the courts, and that a failure to do so exceeds the judicial power, *see id.* at 194-95, 196.

words of the statute is the only proper means of respecting legislative intent, *Mobil Oil Corp.* v. *Higginbotham,* 436 U.S. 618, 626 (1978). The approach of the court of appeals—to demean the Congressional language, and characterize its effect as "unreasonable"—is improperly to deny the power of the legislature to enact precise legislation. The court of appeals would limit Congress's legislative role to the general articulation of policy to be then refined by the judiciary; but this Court has recognized that the "drawing of lines that create distinctions is peculiarly a legislative task. . . ." *Schweicker* v. *Wilson,* 450 U.S. 221, 234 (1981), *quoting from Massachusetts Board of Retirement* v. *Murgia,* 427 U.S. 307, 314 (1976).

The reasoning of the court of appeals—that the legislative lines distinguish categories which a court might perceive to be of a similar "type" (14a), and therefore that adherence to the express statutory language might produce "anomalous" results—has "insufficient force to overcome the plain language of the statute itself." *Potomac Electric Power Co* v. *Director, Office of Workmen's Compensation Programs,* 449 U.S. 268, 280 (1980). Even where the plain language "produces incongruities, the federal courts may not avoid them by rewriting or ignoring that language," *id.* at 283, and the perception that clear statutory language may lead to unusual results in a particular case "does not give judges a license to disregard it." *Id.* at 284. Likewise, the Board's "policy" argument—that if Wilshire's compliance with the plain statutory language is sufficient to remove it from coverage under the BHC Act, then other financial institutions may similarly "evade" regulation by the Board—is a perversion of the word "evade," and is not sufficient ground for ignoring the language. Virtually *any* limitation on a statute's scope and an agency's authority could be thus charcterized as an "evasion," but this cannot nullify an

express Congressional command, because it is a Congressional, not judicial, function to re-evaluate statutory enactments challenged on the basis of "hypothetical cases". *Id.* at 284; *see also Diamond* v. *Chakrabarty, supra,* 447 U.S. at 316-18.

In sum, the court of appeals refused to recognize—as the Board itself did in a directly analogous situation under the second branch of § 2(c)—that:

> "The question whether the definition of 'bank' contained in the BHC Act should be changed is more appropriately a matter for Congressional consideration . . ."*

The decision below departed from established principles articulated by this Court, first by looking beyond the statutory language in the absence of ambiguity, second by concluding, in essence, that Congress meant nothing whatsoever by the words "legal right," and third by becoming enmeshed in a policy analysis beyond the competence of the judicial branch.

B. The Court of Appeals' Judicial Legislation Is Unworkable as Well as Improper, Because the Court's Reasoning Would Render the BHC Act Incapable of Fair and Rational Application

At the behest of the Board, the court of appeals abandoned its judicial role and undertook to re-legislate § 2(c) for Congress, on the basis of the notion that "TCNJ is the type of institution that Congress meant to include" (14a), but that Congress somehow neglected to enact the language that it supposedly "meant." Simply to embark upon this mode of reasoning was contrary to the decisions of this

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* *American Banker,* March 13, 1981, p. 16, Cols. 3-4. (Letter regarding the Board's approval of the Gulf & Western transaction, *see* note ** at pages 4-5, *supra.*)

Court. But the court of appeals went much farther, and substituted for the precise Congressional definition a series of extraneous concepts that are irreconcilable with the rational application of the BHC Act and inconsistent with any sensible interpretation of legislative intent. Thus, while the court of appeals sought to justify its departure from the statutory language on the ground that "we may look beyond the plain language . . . to ensure that application of the literal terms does not destroy the practical operation of the statute" (8a-9a)—itself a contradiction in terms—the final result of the court's reasoning is a *reductio ad absurdum* of § 2(c), and consequently the entire BHC Act, which would classify as a "bank" virtually every depository institution in the United States—a result plainly at variance with Congressional intent, and wholly destructive of "the practical operation of the statute."

The centerpiece of the court of appeals' reasoning is the startling assertion that the key words of § 2(c)(1)—"legal right"—mean something entirely different from what they plainly say, and indeed mean nothing at all. In the words of the court of appeals:

> "Congress did not choose the words 'accepts deposits that the depositor has a legal right to withdraw on demand' because it was concerned with the distinction between a depositor's *legal* right to withdraw on demand and the ability *in practice* to withdraw on demand." (12a) (emphasis in original).

How the court of appeals reached this conclusion is somewhat unclear—it denies a distinction established by decades of law and business practice, and instead appears to be based on either or both of two propositions: (1) that "Congress did not consider" the application of § 2(c)(1) to non-interest bearing, non-demand accounts such as TCNJ's

(11a-12a);* or (2) that "Congress was merely adopting the commonly accepted test of whether an institution is a commercial bank" (12a). Why the court of appeals thought that either consideration provided sufficient ground for ignoring the language actually chosen and enacted by Congress is never explained. Certainly, there is no support for such an action in the decisions of this Court, which hold to the contrary. *TVA* v. *Hill*, 437 U.S. 153, 185 (1978): "It is not for us to speculate, much less act, on whether Congress would have altered its stance had the specific events of this case been anticipated." *United States Railroad Retirement Board* v. *Fritz*, 449 U.S. 166, 179 (1981): "[W]e have historically assumed that Congress intended what it enacted."

Though uncertain in genealogy, the court of appeals amendment to § 2(c) is pellucid in effect: to repeal or

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* The court below suggests that what Congress actually had in mind were not "deposits that the depositor has a legal right to withdraw on demand," but rather "deposits on which interest is not paid" (or "typically" not paid) (*see* 11a-12a). But the court does not cite, and we have not located, any portion of either the BHC Act or any of its legislative history that contains any reference to the payment of interest on deposits. When Congress wishes to embody the idea of an interest-bearing deposit in statutory language, it is perfectly capable of doing so in explicit and plain terms, and has done so in other statutes, but not in the BHC Act. *E.g.*, 12 U.S.C. §§ 371a, 1827(g), 1832(a)(1) (1976 & Supp. IV 1980).

Moreover, this aspect of the court of appeals' opinion is in direct conflict with a holding by the highest court of the Commonwealth of Pennsylvania that a non-interest bearing transaction account accessible by negotiable draft but subject to a reservation of the right (whether or not exercised) to require 14 days prior notice of withdrawal—precisely the type of TCNJ account at issue in this case—is neither "payable on demand" nor a "checking" account, *Pennsylvania Bankers Ass'n* v. *Secretary of Banking*, 392 A.2d 1319, 1321-22 (Pa. 1978), and thus raises the additional question of whether § 2(c)(1) is to be construed as pre-empting the Uniform Commercial Code, as well as vast areas of state banking and contract law.

eviscerate the "legal right" language of § 2(c)(1). Throughout its opinion, the court refers repeatedly to TCNJ's commercial lending business (5a, 7a, 13a, 14a n.12, 15a), and seems to suggest that "the possibility of abuse of commercial credit" is the litmus test for the application of § 2(c)'s definition of "bank" (10a, 13a, 14a, 10a, 17a n.15, 19a). Thus, the court of appeals rewrites § 2(c) either to ignore the "deposits" half of the definition entirely, or to provide that an institution that (1) accepts deposits which, "in practice," are paid without the exercise of a right to prior notice of withdrawal, and (2) makes commercial loans, is to be considered "the type of institution that Congress meant to include within the definition of a 'bank' under § 2(c)." (14a). Either way, the court of appeals' analysis is truly the "absurd result" because, under the court of appeals' revision of § 2(c), there would be few, if any, depository institutions in the United States that would not be considered "banks" under the BHC Act.

The record in this case shows that there are literally thousands of depository institutions, some of them owned or controlled by major commercial or industrial firms, that have never been considered "banks" under the BHC Act, but that are empowered to, and in fact do, (1) accept deposits that, "in practice" are immediately withdrawable despite a reserved right to prior notice,* and (2) engage "in the business of making commercial loans" within the meaning of

* In 1980, Congress extended to virtually all depository institutions the power to offer interest-bearing "NOW" accounts, Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, § 303 (March 31, 1980), *codified at* 12 U.S.C. § 1832(a) (Supp. IV 1980), fully aware that such accounts were subject to a reserved right of prior notice of withdrawal which "may not be required in practice" and were accessible by negotiable instruments that were "the functional equivalent of a check," S. Rep. No. 96-368, 96th Cong., 2d Sess. 7 (1980).

BHC Act § 2(c)(2),* and on a scale larger than TCNJ. (A80-99, A340-42, A360-66, A370-76, A380-85). The decision of the court of appeals, if allowed to stand, would call into question the status of those institutions and their parent firms under the BHC Act—and unnecessarily so, because strict adherence to the language of § 2(c)(1) properly would exclude those institutions, as well as TCNJ, from coverage under the BHC Act. This Court therefore should grant certiorari to remove this cloud on the status of a major segment of the financial industry, as well as to correct the gross error of the decision below.

II.

The Court of Appeals' Application of § 5(b) Grants the Board Unprecedented and Virtually Limitless Power to Rewrite the Entire BHC Act.

In deciding another question of first impression under the BHC Act, the court of appeals squarely held "that § 5(b) 'enables the Board to prohibit activities that are technically outside the literal terms of the Act in order to prevent a clear evasion of the purposes of the Act.'" (16a, *quoting from* Board Order, at 19-20 (38a)). This holding, as here applied to § 2(c)'s definition of "bank," in effect grants to an administrative agency—the Board—virtually unfettered discretion to redefine the substantive scope of an important federal statute, and its own jurisdiction thereunder, solely on the basis of the agency's notions of expedient policy. It is thus totally inconsistent with the entire

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* The Board's prior decisions indicate that any regular lending of funds for other than personal, family, household, or charitable purposes in an amount equal to 2% or more of the institution's assets constitutes "engaging in the business of making commercial loans." *See* P. Heller, *Federal Bank Holding Company Law* 10 (1976).

body of jurisprudence under the BHC Act, not to speak of principles of administrative law generally. We know of no case in which any court has ever held that any administrative agency has that kind of power under any federal statute, and any such holding would be inconsistent with the basic concept of legislative sovereignty.

Neither the language nor legislative history of § 5(b) supports the Board's construction, which provided the principal ground for affirmance of the Board's order by the court of appeals. (*See* 19a). On its face and as discussed in its legislative history, § 5(b) is a standard enabling provision, and grants no definitional powers at all. An agency does not "administer" or "carry out" an Act of Congress by ignoring its language and disregarding its definitional distinctions, and Congress does not confer such prerogatives merely by noting in passing that the provision "authorizes the Board to issue regulations and orders necessary in the administration of the Act," S. Rep. No. 84-1095, 84th Cong., 1st Sess. 22 (1955). This conclusion is buttressed by a comparison of § 5(b) with other provisions of the BHC Act. Section 2(e), the BHC Act's definition of "successor", is a specific counterpoint: in addition to enacting definitional language, Congress expressly conferred supplemental definitional powers on the Board by providing that "the Board may, by regulation, further define the term 'successor' to the extent necessary to prevent evasion of the purposes of this [Act],"* 12 U.S.C. § 1841(e)(1976), and the legislative history notes this supplemental authority, *see* S. Rep. No. 84-1095, 84th Cong., 1st Sess. 20 (1955).

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* The court of appeals' opinion would render this language, as well as the "legal right" language of § 2(c)(1), mere surplusage in contravention of the well-settled rule that all parts of a statute are to be given effect. *See, e.g., Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 633 (1973).

In contrast, neither the language nor legislative history of § 2(c) provides the slightest indication that Congress intended the Board to vary or extend the fundamental definition of "bank" in § 2(c), which largely defines the overall scope of the Act.

In addition, the decisions of this Court and other federal courts construing various provisions of the BHC Act are wholly inconsistent with the court of appeals' apparent holding that § 5(b) functions as an administrative override on the entire BHC Act. In no prior case involving the BHC Act has any court ever suggested that § 5(b) could be applied to upset the careful Congressional allocations of specifically defined powers to the Board to deal with various questions arising under the Act. *See Board of Governors* v. *Investment Company Institute*, 450 U.S. 46 (1981) (§ 4(c)(8): power to identify activities "closely related to banking"); *Board of Governors* v. *First Lincolnwood Corp.*, 439 U.S. 234 (1978) (§ 3(c): power to disapprove formation of a holding company on grounds of financial or managerial unsoundness); *County National Bank Corp.* v. *Board of Governors*, 654 F.2d 1253 (8th Cir. 1981) (§ 3(c): power to disapprove bank acquisitions on grounds of anticompetitive effect); *see also Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27 (1979); *South Dakota* v. *National Bank of South Dakota*, 335 F.2d 444 (8th Cir. 1964) *cert. denied*, 379 U.S. 970 (1965). Indeed, if such an overriding administrative power were conferred by § 5(b), then those cases would not have arisen at all.

Moreover, other circuits have held that the Board could not enforce its policy views by disregarding the specific definitional provisions of the BHC Act. In *Patagonia Corp.* v. *Board of Governors*, 517 F.2d 803 (9th Cir. 1975), the Ninth Circuit stated that:

> "[U]nder the [BHC] Act, the Board's administrative mandate is not open ended. Congress did not write the act in general terms, thus leaving extensive areas of law to be developed by the Board. Rather, the Board is charged with the responsibility for administering relatively specific statutory provisions. Congress surely did not intend that the Board would be empowered to expand or constrict the statutory definition of 'subsidiary' . . . in accordance with the Board's conception of regulatory needs."

517 F.2d at 813 n.11; *see also Western Bancshares* v. *Board of Governors*, 480 F.2d 749 (10th Cir. 1973).

Finally, we note that the Board itself has never suggested, at any time during its twenty-six year history of administering the BHC Act up until its decision in this case, that § 5(b) allows it to change the fundamental definition of "bank" in any way. Rather, in each instance where the Board has felt that a change in that definition would be desirable, it has gone to Congress for a statutory amendment.

Having done so, however, the Board has not always been successful in having its views enacted: the very language centrally at issue in this case—that of § 2(c)(1) itself—was the result of Congressional *rejection* in 1966 of the Board's recommended language,* as well as of the various alternative locutions—such as "commercial bank," "demand deposit," "checking account," and "commercial credit"**—

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* *Contrast* BHC Act § 2(c)(1) *with* S.2353, 89th Cong., 1st Sess. § 3 (1965), *reprinted in Senate Comm. on Banking and Currency, Amendments to the Bank Holding Company Act of 1956*, 89th Cong., 1st Sess. 49 (Comm. Print 1965).

** *Contrast* BHC Act § 2(c)(1) *with* S. Rep. No. 91-1084, 91st Cong., 2d Sess. 24 (1970) *and* S. Rep. No. 89-1179, 89th Cong., 2d Sess. 7 (1966).

that are sprinkled throughout the opinion below. Each of those terms has been advanced by the court of appeals or the Board, at one time or another during these proceedings, as more closely expressing what Congress meant than what Congress in fact said. But Congress did not adopt any of those terms or a definition of "bank" which embraced any of those concepts. Instead, Congress performed its constitutional role by making its own choice and enacting its own language, which is plain, precise, and unambiguous, and requires a result contrary to the decisions below. To perform properly their constitutionally assigned roles, the Board and the court of appeals should have respected that Congressional choice, and applied that Congressional language.

The court of appeals ignored every source of guidance—statutory language and structure, legislative history, interpretive case law, administrative practice, and fundamental principles of administrative and constitutional law—in ratifying the Board's arrogation to itself of an unprecedented and uncontrolled power arbitrarily to change the law to suit the Board's idiosyncratic notions of "policy." Whether a court may so rule, in direct contravention of a clear Congressional command, is a question that should be settled by this Court.

Conclusion

For the reasons stated above, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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March 18, 1982

Appendix

[Corrected copy]

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-1560

WILSHIRE OIL COMPANY OF TEXAS,
Petitioner

v.

BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM,
Respondent

ON PETITION FOR REVIEW FROM DECISION OF BOARD
OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

Argued October 26, 1981
Before: ADAMS, VAN DUSEN and SLOVITER,
Circuit Judges
(Opinion filed December 31, 1981)

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Appendix A

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OPINION OF THE COURT

VAN DUSEN, *Senior Circuit Judge*

This matter comes before us as a petition for review of a cease and desist order of the Board of Governors of the Federal Reserve System (the "Board"). The Board found petitioner, Wilshire Oil Company of Texas ("Wilshire"), to be in violation of the Bank Holding Company Act of 1956, as amended, 12 U.S.C. §§ 1841-1850 (1976) (the "BHC Act"). The only contested issue is whether Wilshire's subsidiary, the Trust Company of New Jersey ("TCNJ"), is a "bank" under the BHC Act. Wilshire concedes that if TCNJ is a "bank," then Wilshire is a "bank holding company" engaged in both banking and non-banking activities in violation of § 4(a)(2) of the Act, 12 U.S.C. § 1843(a)(2). We affirm the Board's conclusion that TCNJ is a "bank" under the BHC Act, and deny the Petition for Review seeking to terminate the cease and desist order against Wilshire.

I. *Statutory Background*

The Bank Holding Company Act, 12 U.S.C. §§ 1841-1850 (1976), was enacted to prevent the concentration of commercial banking activities and to separate banking from

commerce.[1] Section 4 of the BHC Act generally restricts the non-banking activities of "bank holding companies," defined in § 2(a)(1) as companies which have "control over any bank." As originally enacted, the BHC Act restricted the non-banking activities of only companies that controlled more than one bank, but in 1970 Congress amended the Act so as to apply also to one-bank holding companies. Under § 4(a)(2), these one-bank holding companies were given 10 years, until December 31, 1980, either to divest their non-banking operations or to cease being bank holding companies. 12 U.S.C. § 1843(a)(2) (1976).

Congress has twice modified the definition of "bank" under the BHC Act. The original definition included all national banks, state banks, and savings banks. Act of May 9, 1956, c. 240, § 2(c), 70 Stat. 133. In 1966, the definition was narrowed to encompass only those domestic institutions which "[accept] deposits that the depositor has a legal right to withdraw on demand." Act of July 1, 1966, Pub.L. 89-485, § 3, 80 Stat. 236, 237. The current definition was enacted in 1970:

> "(c) 'Bank' means any institution . . . which (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans."

12 U.S.C. § 1841(c) (1976).

The Board of Governors of the Federal Reserve System is charged with the administration of the BHC Act, and § 5(b) authorizes the Board "to issue such regulations and orders as may be necessary to enable it to administer and

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[1] *See* S. Rep. No. 1095, 84th Cong., 1st Sess. 2 (1955), *reprinted in* [1956] U.S. Code Cong. & Ad. News 2482, 2483.

carry out the purposes of this chapter and prevent evasions thereof." 12 U.S.C. § 1844(b) (1976). Under §§ 8(b)(1) & (3) of the Financial Institutions Supervisory Act of 1966 ("FISA"), 12 U.S.C. §§ 1818(b)(1) & (3) (Supp. 1980), the Board also has the power to institute cease and desist proceedings whenever it has reason to believe that the BHC Act is about to be violated.

II. *The Facts*

Wilshire Oil Company of Texas, the petitioner here, is engaged in the production of oil and natural gas, both directly and through its subsidiaries. Until November 1980, Trust Company of New Jersey, one of Wilshire's subsidiaries,[2] was concededly a "bank" under the BHC Act's current definition; TCNJ "(1) accept[ed] deposits that the depositor [had] a legal right to withdraw on demand, and (2) engage[d] in the business of making commercial loans." 12 U.S.C. § 1841(c) (1976).[3] Because Wilshire controlled a "bank," it was a bank holding company required by § 4(a)(2) either to divest its oil and gas business or to cease being a bank holding company before December 31, 1980.

Beginning in 1977, the Board frequently urged Wilshire to decide how it would come into compliance with the BHC Act before the December 31, 1980, deadline. Wilshire suggested several possible ways of complying with the Act, but made no firm proposal until November 1980. On November 3, 1980, less than two months before the final

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[2] Wilshire owns 90% of the shares of TCNJ (App. 129).

[3] Because TCNJ's deposits are insured by the Federal Deposit Insurance Corporation ("FDIC"), TCNJ is also subject to federal regulations issued by the FDIC.

deadline, Wilshire notified the Board that it intended to keep both its oil and gas business and its interest in TCNJ. Wilshire announced that it would comply with the BHC Act by changing TCNJ into a "nonbank" under the Act.

On November 5, 1980, TCNJ sent a notice to its depositors that:

> "The Trust Company of New Jersey, beginning November 20, 1980 reserves the right to require 14 days notice prior to withdrawal from its transactional accounts. The Trust Company has never exercised its right to require notice and has no intention of exercising a notice provision on any type of account."

(App. 294). TCNJ also modified its account agreement forms for its newly-named "transactional accounts" to include this reservation of the right to require notice for withdrawal. Except for this reservation, TCNJ has not changed any of its banking operations, and the reservation has had no practical effect on the institution. Specifically, TCNJ has not altered its commercial lending activities.

Wilshire claims that this reservation of a right to require notice means that TCNJ's depositors no longer have "a legal right to withdraw [their deposits] on demand," and therefore TCNJ is not a "bank" under the BHC Act definition in § 2(c) and Wilshire is not a "bank holding company" under § 2(a)(1). The Board disagreed and issued a Notice of Charges against Wilshire, its directors, and certain officers on December 9, 1980, pursuant to §§ 8(b)(1) & (3) of FISA, 12 U.S.C. §§ 1818(b)(1) & (3). The Board also directed that a formal administrative hearing be held to determine whether Wilshire would be in violation of the BHC Act on January 1, 1981.

Appendix A

On December 31, 1980, Wilshire transferred all of its TCNJ shares to an independent trustee. The operations of the two companies were temporarily separated, and all interlocking officer and director relationships were terminated.

After the December 31, 1980, deadline had passed, the Board amended its December 9 Notice of Charges and issued a Notice of Assessment of Civil Money Penalties. This latter notice, issued on January 6, 1981, under §§ 8(b)(1) & (3) of FISA and § 8(b) of the BHC Act, charged Wilshire, its directors and certain officers, with a violation of § 4(a)(2) of the BHC Act.

The administrative proceedings culminating in the Board's order now under review were governed by an agreement between Wilshire and the Board. In this agreement, Wilshire waived its right to a formal administrative hearing, and both parties agreed that "the sole issue between the parties is the legal issue whether TCNJ is a bank under the BHC Act and Wilshire is a bank holding company under the BHC Act and whether TCNJ's reservation of the right to 14 days' advance notice of withdrawal from deposits at TCNJ caused TCNJ to become a nonbank for purposes of the BHC Act" (App. 36-37). The agreement also ensured the temporary separation of Wilshire's and TCNJ's operations, incorporating the terms of the trust established by Wilshire on December 31, 1980, pending final judicial review of the Board's order.[4]

The Board of Governors of the Federal Reserve System issued its Final Decision and Order on April 2, 1981.

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[4] The Board also agreed to withdraw, with prejudice, the charges against the directors and certain officers of Wilshire. Wilshire agreed that if it were found in violation of the BHC Act, it would pay a civil penalty of $1,000 per day for the period between January 1, 1981, and the day Wilshire came into compliance with the Act.

The Board concluded that TCNJ was a "bank" within the meaning of the BHC Act, that Wilshire was a bank holding company that was required to divest its nonbanking operations by December 31, 1980, and that, since Wilshire did not do so, it was in violation of § 4(a)(2) of the Act. Wilshire then petitioned for review.

III. *Statutory Language*

The basic thrust of Wilshire's argument is that when Congress has written precise and detailed definitions in a statute, the Board cannot expand its own regulatory power by applying the substantive terms of the statute in a setting where the plain definitional requirements are not met. Wilshire relies on the Supreme Court's admonition regarding statutory interpretation: " '[t]he starting point in every case involving construction of a statute is the language itself.' " *Southeastern Community College* v. *Davis*, 442 U.S. 397, 405 (1979), *quoting Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring).

Wilshire argues that TCNJ's reservation of the right to require 14 days' notice of withdrawal means that the holders of its "transactional accounts" no longer have a *legal* right to withdraw their deposits on demand. Because the depositors lack this legal right, Wilshire contends, TCNJ does not fit within the literal definition of a "bank" in § 2(c) of the Act, and Wilshire is not a bank holding company subject to the Board's regulatory powers.

The Board concluded in its Final Order and Decision that "TCNJ is a 'bank' within the meaning of the section 2(c) of the BHC Act because it accepts deposits that the depositor has the legal right to withdraw on demand and engages in the business of making commercial loans . . . "

(App. 236). The Board considered the statement sent by TCNJ to its depositors reserving the right to require notice of withdrawal, and noted that this announcement stated that TCNJ "has no intention of exercising" this reserved right. The purpose of this disclaimer of intention, the Board assumed, was to induce TCNJ's checking account customers not to withdraw their deposits from TCNJ. Referring to § 90 of the Restatement (Second) of Contracts on promissory estoppel,[5] the Board stated "it appears that a depositor who relies to his detriment on TCNJ's representation of intent not to invoke the prior notice requirement may have a legally enforceable right in a court of law (on a breach of contract theory or on general equitable principles) to prevent TCNJ from asserting any prior notice requirement" (App. 228).

Wilshire disagrees and asserts that TCNJ's letter to its depositors of November 5, 1980, was effective in reserving a right to require advance notice. It argues that no promise was made by TCNJ that it would never exercise the right, nor was there any voluntary waiver of the right. Wilshire supports this contention by noting that the disclaimer of any intention to exercise the right was sent to the depositors in the same notice that reserved the right in the first place. This makes clear to depositors, Wilshire argues, that TCNJ did not promise to forego its right, but merely stated its intention not to exercise the right in the foreseeable future. Wilshire also

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[5] Section 90 of the Restatement (Second) of Contracts provides:

> "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires."

Restatement (Second) of Contracts § 90 (1981).

points to the documents used by TCNJ to open new accounts since November 1980 which contain the reserved right to require notice, but not the disclaimer of intention to exercise that right (App. 281, 283). TCNJ has not given the holders of these accounts any assurance that it will not require them at some point in the future to give 14 days' advance notice of withdrawal.

We do not need to decide, however, if the Board was correct in its conclusion that TCNJ's depositors still have a legal right to withdraw their funds on demand despite TCNJ's reservation of the right to require advance notice.[6] While the language of the BHC Act may be the starting point in construing the statute, we may look beyond the plain language, if necessary, to ensure that application of the literal terms does not destroy the practical operation of the statute. The Supreme Court has cautioned:

> "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words."

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[6] We note that the Board does not rely heavily on the argument that TCNJ falls within the literal definition of the term "bank" in the statute. The Board stated "it *appears* that a depositor . . . *may have* a legally enforceable right" to withdraw on demand (App. 228: emphasis added).

United States v. *Amer. Trucking Ass'ns.*, 310 U.S. 534, 543 (1940) (footnotes omitted). *Accord, United States* v. *Rutherford*, 442 U.S. 544, 552 (1979). In reviewing the Board's determination, we must also consider the Supreme Court's instruction in *United States* v. *Rutherford, id.*, that "the construction of a statute by those charged with its administration is entitled to substantial deference." *Id.* at 553. With these considerations in mind, we turn to the Board's analysis of the congressional purpose in enacting the BHC Act and its amendments.

IV. *Legislative History*

The legislative history discussed in the Board's Final Decision and Order shows that Congress intended to include an institution such as TCNJ under the definition of "bank" in the BHC Act. Congress enacted the BHC Act "to prevent possible abuses related to the control of commercial credit" by separating commercial banking from commerce. S. Rep. No. 91-1084, 91st Cong., 2d Sess. 24 (1970), *reprinted in* [1970] U.S. Code Cong. & Ad. News 5519, 5541. Congress found it necessary to amend the definition of "bank" twice, as it sought a definition that would serve the purposes of the statute, without unnecessarily restricting banks that did not engage in commercial credit transactions.[7]

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[7] *Cf. Otero Savings and Loan Ass'n* v. *Federal Home Loan Bank Board*, No. 80-2346 (10th Cir. Nov. 13, 1981), a case involving the interpretation of another frequently amended federal banking statute, 12 U.S.C. § 1832(a) (concerning interest-bearing checking accounts). Judge McKay noted in his concurrence that because "the congressional legislation evolved in a piecemeal fashion so that sometimes one enactment overlapped or did not quite match another . . . . we must emphasize the objectives of Congress without overemphasizing the individual steps taken to achieve those ends." *Id.* typescript op. at 1 (McKay, J., concurring).

Appendix A

The legislative history indicates that the original definition of "bank" in the BHC Act was considered too broad, and the 1966 amendment to the definition, which generated the first half of the current definition, was passed to remedy this problem:

> "Section 2(c) of the [original] act defines 'bank' to include savings banks and trust companies, as well as commercial banks. The purpose of the act was to restrain undue concentration of control of commercial bank credit, and to prevent abuse by a holding company of its control over this type of credit for the benefit of its nonbanking subsidiaries. This objective can be achieved without applying the act to savings banks, and there are at least a few instances in which the reference to 'savings bank' in the present definition may result in covering companies that control two or more industrial banks. To avoid this result, the bill redefines 'bank' as an institution that accepts deposits payable on demand (checking accounts), the commonly accepted test of whether an institution is a commercial bank so as to exclude institutions like industrial banks and nondeposit trust companies."

S. Rep. No. 1179, 89th Cong., 2d Sess. 7 (1966), *reprinted in* [1966] U.S. Code Cong. & Ad. News 2385, 2391.

The Senate Report shows that the 1966 definition of a "bank" as "any institution . . . which accepts deposits that the depositor has a legal right to withdraw on demand" was meant to include those institutions that accept "deposits payable on demand (checking accounts)." *Id.* Traditionally, the ability to withdraw deposits on demand has been associated with non-interest bearing checking accounts, while a reservation of a right to require advance notice of withdrawals has been a condition of interest-

bearing savings accounts. *See* Final Decision and Order of the Board, at 14, App. 230; 12 U.S.C. §§ 371a & 1828(g) (Supp. 1980) (generally forbidding the payment by insured banks of interest on demand deposits).[8] It is reasonable to conclude, as did the Board, that the reason why Congress did not consider in its definition of "bank" an institution such as TCNJ that offers accounts that are non-interest bearing and *not* accessible on demand was simply because such accounts were not commonly used.[9] Congress did not choose the words "accepts deposits that the depositor has a legal right to withdraw on demand" because it was concerned with the distinction between a depositor's *legal* right to withdraw on demand and the ability *in practice* to withdraw on demand. The more reasonable interpretation of why Congress selected those terms is that stated in the Senate Report, *supra*: Congress was merely adopting "the commonly accepted test of whether an institution is a commercial bank." *Id.*[10]

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[8] Even though the 1980 Deregulation Act, 12 U.S.C.A. § 1832 (Supp. 1981), allows financial institutions to offer to individuals and non-profit corporations interest-bearing accounts that are accessible by negotiable instrument, the regulations mandate that the institutions still reserve the right to require advance notice for withdrawals. *See* 12 C.F.R. Parts 217, 329 (1981). We note that this reservation of a right to require advance notice is once again associated with interest-bearing accounts, unlike TCNJ's non-interest bearing transactional accounts.

[9] The Board, in its Final Decision and Order, at 14 n.11, recognized that federal law does not *require* the payment of interest on savings accounts that are subject to a reservation of the right to require notice of withdrawal (App. 230 n.11). We emphasize that financial institutions typically do pay interest on accounts subject to this reservation, because it indicates the factual context in which Congress defined the term "bank."

[10] The General Counsel of the Federal Deposit Insurance Corporation (FDIC) has concluded that TCNJ's corporate transactional ac-

(footnote continued on following page)

This interpretation of the legislative history is reinforced by the Senate Report to the 1970 amendment of the BHC Act, which once again changed the definition of "bank" in § 2(c) of the Act. This amendment added the second element of the current definition: whether the institution "engages in the business of making commercial loans." 12 U.S.C. § 1841(c)(2). The Senate Report shows clearly that, in framing the definition of "bank," Congress was not as concerned with the precise legal rights of a bank's depositors as it was with the practical effect of the Act on commercial lending practices:

> "The definition of 'bank' adopted by Congress in 1966 was designed to include commercial banks and exclude those institutions not engaged in commercial banking, since the purpose of the act was to restrain undue concentration of commercial banking resources and to prevent possible abuses related to the control of commercial credit. However, the Federal Reserve Board has noted that this definition may be too broad and may include institutions which are not in fact engaged in the business of commercial banking in that they do not make commercial loans. The committee, accordingly, adopted a provision which would exclude institutions that

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counts are in fact "demand deposits" under the FDIC regulations. He determined that these accounts are neither "saving accounts," since they are accessible by negotiable instrument, *see* 12 C.F.R. §§ 217.5(c) & 329.5(c) (1981), nor "time deposits" because they have no fixed maturity nor required notice of withdrawal of 14 days or more, 12 C.F.R. §§ 217.1(d) & 329.1(d) (1981). Therefore, since a "demand deposit" is defined as a deposit that is neither a savings deposit nor a time deposit, 12 C.F.R. §§ 217.1(a) & 329.1 (a) (1981), TCNJ's transactional accounts must be "demand deposits." Letter of Frank L. Skillern to Neal L. Petersen, March 3, 1981 (App. 497-500).

> are not engaged in the business of making commercial loans from the definition of 'bank.' "

S. Rep. No. 91-1084, 91st Cong., 2d Sess. 24 (1970), *reprinted in* [1970] U.S. Code Cong. & Ad. News 5519, 5541.

This legislative history shows that TCNJ falls within the category of institutions that Congress intended to include in its definition of "bank" in the BHC Act. In practice, TCNJ's "transactional accounts" are "demand deposits," because, as TCNJ has notified its customers, it has no intention of exercising its right to require advance notice of withdrawals.[11] There is no dispute that TCNJ makes commercial loans.[12] Together, these factors indicate that the possibility of abuse of commercial credit exists, and TCNJ is the type of institution that Congress meant to include within the definition of a "bank" under § 2(c).

V. *The Board's Power to Prevent Evasions of the Act*

Congress specifically instructed the Board to look to the purposes of the BHC Act in administering its terms. Section 5(b) of the Act provides:

> "The Board is authorized to issue such regulations and orders as may be necessary to enable it to administer and carry out the purposes of this chapter and prevent evasions thereof."

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[11] The deposit slips used for these accounts are still labeled for "checking" accounts, and TCNJ referred to its deposits as "demand deposits" in its Report of Condition for the last quarter of 1980, filed with the FDIC on January 27, 1981 (App. 479).

[12] TCNJ had $89,067,000. in commercial and industrial loans outstanding as of December 31, 1980. This information was reported to the FDIC on January 27, 1981, on a standardized form labeled "Consolidated Report of Condition (*Commercial Bank*)" (App. 479; emphasis supplied).

12 U.S.C. § 1844(b) (1976).[13] The Board found, and Wilshire does not contest on appeal, that TCNJ has made no functional change in its banking operations, and the reservation of a right to require notice has had no practical effect on the bank's deposits. Given that the Act admittedly applied to TCNJ before November 1980 because of its commercial activities, the Board appropriately determined that it must continue to apply the Act to TCNJ to "carry out the purposes" of the BHC Act.

Section 5(b) also permits the Board to act to "prevent evasions" of the BHC Act. Wilshire admitted at oral argument that the purpose of the reservation of the right to require advance notice was to take TCNJ outside the BHC Act.[14] Because we approve the Board's finding that the reservation of the right to advance notice served no banking purpose, but was made merely to withdraw TCNJ from

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[13] Wilshire seeks to minimize the significance of § 5(b) of the BHC Act by pointing to the specific authority given the Board under § 2(e) to further define the term "successor" to prevent evasions of the Act. 12 U.S.C. § 1841(e) (1976). Wilshire argues that because Congress did not also specifically allow the Board to further define "bank," the Board's power to do so is limited by negative implication. A more plausible inference that may be drawn from the specific provision of § 2(e) is that Congress was able to anticipate problems arising under the definition of "successor," but was uncertain what other terms of the statute could be manipulated so as to evade the Act. Congress enacted § 5(b) as a catch-all, to cover any other evasions attempted through activity conforming to the letter, but not the spirit, of the statute. *Cf. American Trucking Ass'ns.* v. *United States*, 344 U.S. 298, 309-10 (1953) (rejecting as "a reasonable canon of interpretation" the notion that "the draftsmen of acts delegating agency powers, as a practical and realistic matter, can or do include specific consideration of every evil sought to be corrected").

[14] Both the "Resolutions of Wilshire Oil Company of Texas," App. 290-91, and the "Resolution for the Trust Company of New Jersey," App. 292-93, which approved the reservation of the right to require notice, indicate that the reservation was made to escape the requirements of the BHC Act and would have little, if any, effect on TCNJ's operations.

the coverage of the BHC Act, we accept the Board's order as necessary to "prevent evasion" of the Act. The Board explained its conclusion:

> "[A]ny determination by the Board to the effect that TCNJ's notice to its demand deposits customers terminates TCNJ's status as a bank under the BHC Act would serve to nullify the entire regulatory framework of that Act. If a bank holding company is permitted to escape its obligations under the Act without making any functional change in its operations simply by causing its subsidiary bank(s) to send a notice to customers holding demand deposits reserving a right to notice of prior withdrawal, circumvention of the Act's substantive requirements on a large scale is likely."

Final Decision and Order of the Board, at 19, App. 235 (footnote omitted). Since acceptance of Wilshire's position would allow evasions of the Act, we agree with the Board that § 5(b) "enables the Board to prohibit activities that are technically outside the literal terms of the Act in order to prevent a clear evasion of the purposes of the Act." Final Decision and Order of the Board, at 19-20, App. 235-36.[15]

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[15] We also reject Wilshire's analogy to the Board's approval of the actions taken recently by Gulf & Western Corp. to make a proposed subsidiary a "nonbank" under the BHC Act. Gulf & Western sought to acquire Fidelity National Bank ("FNB") through another subsidiary. In order to avoid the restrictions of the BHC Act, FNB divested itself of its commercial loan portfolio, and assured the Board that it would separate its demand deposit-taking functions from the commercial lending business of other Gulf & Western subsidiaries. Because FNB no longer makes commercial loans, it falls outside the literal terms of the second prong of the BHC Act's definition of "bank." The Board approved the Gulf & Western acquisition of

(footnote continued on following page)

We find support for the Board's decision to look behind the form of TCNJ's activities to their substance in *First National Bank in Plant City* v. *Dickinson,* 396 U.S. 122 (1969). *Plant City* involved the definition of a "branch" bank under the McFadden Act of 1927, 12 U.S.C. § 36(f) (1976). This act permits national banks to establish branch banks only in states where state banks are allowed to branch. The Supreme Court was presented with the question of whether a national bank's armored car "mobile drive-in" service and a stationary, secured receptacle for deposits were "branches" under § 36(f) of the McFadden Act. Concluding that § 36(f) included within the definition of "branch" any place for receiving "deposits," the Court considered the effect of the national bank's agreement with its customers that the moneys delivered to the armored car and stationary receptacle were not deemed "deposited" until delivered at the bank.

(footnote continued from preceding page)

FNB on March 12, 1981. *See* letter from James McAfee, Assistant Secretary to the Board, to Robert C. Zimmer, March 12, 1981, reprinted in AMERICAN BANKER, March 13, 1981, at 26 (App. 392-93).

Wilshire argues that the Board's decision in the Gulf & Western transaction indicates that it is "entirely proper and lawful" (Reply Brief for Petitioner at 23) for a company to make changes in its subsidiary's operations so as to take the subsidiary out of the definition of "bank" in the BHC Act. Without expressing any opinion on the Board's action in the Gulf & Western case, we note the significant differences between the two cases.

In the Gulf & Western case, the Board found that FNB made a substantive change in its banking operations when it divested its commercial loan portfolio. Because FNB no longer controlled commercial credit, there was no longer the same danger of the abuses related to commercial banking that the BHC Act was designed to prevent. In the present case, however, TCNJ's reservation of a right to advance notice has no practical effect on the operation of the institution, and the purpose of the BHC Act is still threatened by Wilshire's control over TCNJ.

The Court held that the armored car and stationary receptacle were "branches" within the definition in § 36(f), despite the bank's private, contractual arrangements with its customers. The Court found that "the contracts have no significant purpose other than to remove the possibility that the monies received will become 'deposits' in the technical and legal sense until actually delivered to the chartered premises of the bank." 396 U.S. at 136. The Court ignored the bank's technical interpretation of the statutory definition and looked instead to the purpose of Congress in enacting the McFadden Act—to maintain competitive equality between state and national banks. *Id.* As the Court concluded:

> "Here, penetrating the form of the contracts to the underlying substance of the transaction, we are satisfied that at the time a customer delivers a sum of money either to the armored truck or the stationary receptacle, the bank has, for all purposes contemplated by Congress in § 36(f), received a deposit."

Id. at 137.

In the Wilshire case, the Board quite properly "penetrat[ed] the form of the contracts to the underlying substance of the transaction," *id.*, when it held that TCNJ's reservation of a right to require advance notice had no effect on TCNJ's status as a "bank" under the BHC Act. As in *Plant City,* TCNJ's reservation had "no significant purpose" other than to take TCNJ out of the literal definition of "bank" in the Act. Furthermore, the Board's power to look to the practical effect of the private transaction, as well as the purpose of Congress in enacting the statute, is even clearer here than in *Plant City,* because Congress specifically gave the Board the power to "carry out the purpose of [the BHC Act] and prevent evasions thereof." 12 U.S.C. § 1844(b) (1976).

VI. *Conclusion*

The BHC Act was enacted to prevent the possibility of a holding company abusing its control over commercial bank credit for the benefit of its non-banking operations. Congress granted the Board the power to administer the Act, specifically authorizing the Board to consider this purpose in doing so. Because the Board's cease and desist order against Wilshire was within this authority granted to the Board in § 5(b) of the Bank Holding Company Act, we will affirm the Final Decision and Order of the Board of Governors of the Federal Reserve System and deny the Petition for Review.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

UNITED STATES OF AMERICA

BEFORE THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

WASHINGTON, D.C.

Docket No. 1114026

In the Matter of

WILSHIRE OIL COMPANY OF TEXAS,
Jersey City, New Jersey

FINAL DECISION AND ORDER

Preliminary Statement

The Board of Governors of the Federal Reserve System has initiated this action under the provisions of the Bank Holding Company Act of 1956, as amended, 12 U.S.C. § 1841 *et seq.* ("the BHC Act") and the Financial Institutions Supervisory Act of 1966 (12 U.S.C. § 1818(b) *et seq.*) ("FISA") to determine whether an order should issue requiring Wilshire Oil Company of Texas, Jersey City, New Jersey ("Wilshire") and its directors and officers to cease and desist from violating the BHC Act. The Board alleged that Wilshire had violated section 4(a)(2) of the BHC Act, 12 U.S.C. § 1843(a)(2), by failing to divest its nonbank activities or by failing to cease being a bank holding company under the Act by December 31, 1980.

Wilshire and the Board have agreed that there are no material questions of fact in dispute that would require an

administrative hearing on the legal issue of whether Wilshire's subsidiary, Trust Company of New Jersey, Jersey City, New Jersey ("TCNJ"), is a bank under the BHC Act, thereby causing Wilshire to be a bank holding company under the BHC Act and whether TCNJ's reservation of the right to 14 days' advance notice of withdrawal from demand deposits at TCNJ caused TCNJ to become a nonbank for purposes of the BHC Act. Therefore, Wilshire has waived all rights to a formal administrative hearing on an Amended Notice of Charges and of Hearing issued by the Board against Wilshire under section 8(b)(1) and (h) of FISA, the BHC Act and the Board's Rules of Practice for Hearing ("Rules of Practice") (12 C.F.R. Part 263), and described more fully below. Wilshire has also waived all rights to consideration of, and a recommended decision on, the issue of TCNJ's and Wilshire's status under the BHC Act by an Administrative Law Judge.[1]

Accordingly, based on the record herein and the briefs and exhibits submitted by Wilshire and counsel for the Board, the Board makes the following findings of fact.

Findings of Fact

Wilshire is a corporation organized and doing business under the laws of the State of Delaware and has its principal place of business in New Jersey.

Wilshire became a bank holding company on December 31, 1970, as a result of the 1970 Amendments to section 2(a)(1) of the BHC Act (12 U.S.C. § 1841(a)(1)), by

[1] Wilshire has consented to the participation in the Board's decision in this matter by employees or agents of the Board who have engaged in the performance of investigative or prosecuting functions in connection with this proceeding. However, no such employees have participated in the Board's decision.

virtue of its ownership on that date of more than 25 per cent of the outstanding voting shares of TCNJ, an organization chartered as a commercial bank under the laws of the State of New Jersey, the deposits of which are insured by the Federal Deposit Insurance Corporation.

At the time Wilshire became a bank holding company, it was engaged directly and through subsidiaries in the exploration and development of crude oil and natural gas production, as well as other natural resources, leasing of mining, oil and similar properties, and real estate investment and development. It also engaged through subsidiaries in wholesale distribution of electrical components and automobile parts and accessories. Wilshire and its subsidiaries are presently engaged in oil and natural gas production and related activities.

Section 4(a)(2) of the BHC Act provides generally that a company that became a bank holding company as a result of the 1970 Amendments may not retain its nonbanking subsidiaries and activities after December 31, 1980, if it remains a bank holding company after that date. Wilshire has had ten years in which to plan to divest either its nonbanking shares and activities or its banking operations, or otherwise to comply with the provisions of the BHC Act.

By order dated July 27, 1972, the Board found that Wilshire was not a "company covered in 1970" as that term is defined in section 2(b) of the BHC Act (12 U.S.C. § 1841(b)) and, accordingly, is not eligible to retain its nonbanking shares and activities indefinitely. Wilshire did not petition for judicial review of this order pursuant to section 9 of the BHC Act. 12 U.S.C. § 1848. Wilshire has claimed no other exemption for the retention of its nonbanking shares and activities after December 31, 1980.

Since 1977, the Board has repeatedly reminded affected companies of the 1980 divestiture requirements of section

4(a)(2) of the BHC Act, and advised them to plan for compliance with those requirements. In particular, the Board issued public statements on February 25, 1977, October 13, 1977, December 28, 1978, and December 13, 1979, urging affected companies to submit divestiture plans to the Board. In its December 13, 1979, statement the Board stressed that it would regard a violation of section 4(a)(2) of the BHC Act "as an extremely serious matter," and that it would not regard the pendency of a divestiture proposal or petition for judicial review as a mitigating factor. Each of these statements was transmitted to and received by Wilshire. The Board did not receive, nor was Wilshire required to submit, any response. Since February 1977, the Federal Reserve Bank of New York ("Reserve Bank"), acting on behalf of the Board, has sent numerous letters to Wilshire reiterating the Board's warnings regarding the 1980 divestiture requirements, and soliciting Wilshire's plans for compliance with those requirements. Wilshire made initial inquiries concerning the sale of TCNJ in 1977 but did not pursue this course.

On October 31, 1978, Wilshire entered into a Written Agreement with the Reserve Bank concerning certain banking practices of TCNJ, paragraph 3 of which required Wilshire to submit a plan for compliance with section 4(a)(2) of the BHC Act within 30 days of the date of the Agreement. By letter dated November 30, 1978, Wilshire, through its counsel, submitted a general memorandum discussing the merits of several alternatives available to it for compliance, and stating that no firm decision had been made. The alternatives discussed in that memorandum were the sale or spin-off of TCNJ's shares, and the sale or spin-off of Wilshire's nonbanking assets. While conceding that the oil and gas properties and leases were marketable

under then current market conditions, Wilshire indicated its reluctance to dispose of such properties.

On May 12, 1980, the Board adopted a Policy Statement announcing a program to assure compliance with the 1980 divestiture requirements. Under this program, companies affected by the divestiture provisions were required to file monthly reports beginning August 1, 1980, to enable the Board to monitor their progress. By letter to the Reserve Bank dated August 1, 1980, Wilshire reported that it was exploring all possible avenues for compliance, but that it had no firm proposal. The Reserve Bank advised Wilshire on August 15, 1980, that this report did not provide sufficient information to assess Wilshire's progress. A similar report with no firm divestiture proposal, which was filed by Wilshire on September 8, 1980, noted that Wilshire was discussing with the Reserve Bank the possibility of placing TCNJ in a trust pending divestiture.

By letter dated November 3, 1980, Wilshire announced to the Board that it intended to retain its nonbanking interests, as well as the shares of TCNJ, but would comply with the provisions of section 4(a)(2) of the BHC Act by altering TCNJ's deposit-taking activities. In particular, it advised the Board that Wilshire would cause TCNJ to send a notice to all of its demand depositors reserving the right to require 14 days' prior notice of withdrawal from such accounts. Inasmuch as section 2(c) of the BHC Act defines "bank" as any institution that accepts demand deposits and makes commercial loans, Wilshire contends that as a result of the notice sent to TCNJ's customers, TCNJ would no longer be a bank, and, therefore, Wilshire would no longer be a bank holding company. In view of objections previously raised by the Reserve Bank in conversations concerning this plan, Wilshire suggested that the matter be presented to the Board for consideration "immediately."

Appendix B

On or about November 5, 1980, Wilshire proceeded with its plan and caused TCNJ to mail a notice to its depositors, including its individual and corporate demand depositors, stating that effective November 20, 1980, it would reserve the right to require 14 days' prior notice of withdrawal on such accounts. The notice also stated that TCNJ did not intend to exercise the right to require prior notice.

TCNJ has not altered its business or operations in any relevant respect, and continues to hold itself out to the public as a full service commercial bank. Both prior to and after November 5, 1980, TCNJ has offered to both commercial and individual customers deposit accounts that are immediately accessible through checks or drafts payable to third parties and that do not bear interest. TCNJ's transaction account customers have the same account numbers and use the same checks and there is no substantial change in their relationship with TCNJ. TCNJ's transaction accounts for business organizations are limited to $150,000.

Pursuant to its authority under section 5(b), the Board issued letters dated November 17, and November 28, 1980, advising Wilshire that the Board had concluded, based on its review of the legislative history of the BHC Act and other statutory provisions, that the reservation of the right to require 14 days' prior notice of withdrawal would not cause TCNJ to cease being a bank within the meaning of the BHC Act and therefore Wilshire's actions would not result in the termination of Wilshire's status as a bank holding company.

On December 9, 1980, the Board, pursuant to its authority under section 8(b)(1) and (3) of FISA, issued a Notice of Charges against Wilshire, its directors and certain officers and directed that a formal administrative hearing be held to determine whether an order should be issued

under FISA requiring Wilshire and its officers and directors to cease and desist from violation of the BHC Act.

On December 31, 1980, Wilshire transferred all TCNJ shares owned by Wilshire to an independent trustee to hold for the benefit of Wilshire and its shareholders. All officer and director interlocks between Wilshire and TCNJ were severed to separate temporarily the operations of the companies.

On January 6, 1981, the Board amended its December 9 Notice of Charges against Wilshire and issued a Notice of Assessment of Civil Money Penalties against Wilshire and its directors and certain officers and Mr. Siggi Wilzig (formerly Wilshire's Chairman and Chief Executive Officer and a principal shareholder of Wilshire), pursuant to the provisions of 12 U.S.C. § 1847(b), charging a violation of the divestiture requirements of section 4(a)(2) of the BHC Act. On January 16, 1981, Wilshire and its directors and officers and Mr. Wilzig requested a formal hearing on the civil money penalty assessment.

On February 18, 1981, Wilshire and Mr. Wilzig entered into an agreement with the Board (the "Agreement") providing for resolution of the administrative proceedings against Wilshire and its directors and officers without a formal hearing.[2] The Agreement also provides for the transfer of Wilshire's shares of TCNJ to an independent trustee and requires that Wilshire and TCNJ be operated separately and independently of each other during the administrative proceedings and pending judicial review of any Board Order adverse to Wilshire with respect to TCNJ's and Wilshire's status under the BHC Act. The Agreement also provides that if the Board issues an order requiring

[2] The Agreement is attached as the Appendix to this Final Decision and Order.

Wilshire to comply with the BHC Act that is not overturned on judicial review, Wilshire will pay a civil penalty of $1,000 for each day from January 1, 1981 until Wilshire complies with the Act.[3]

Discussion

Wilshire contends that because TCNJ has reserved the right to require 14 days' prior notice of withdrawal from its demand deposits, TCNJ is no longer a "bank" for purposes of the BHC Act because TCNJ no longer accepts deposits that the depositor has a legal right to withdraw on demand. In response, counsel representing the Board in this matter asserts that, in light of the legislative history and purposes of the BHC Act and other provisions of federal law, the reservation of the right to prior notice does not alter TCNJ's status as a "bank" for purposes of the Act, but is a sham transaction intended solely to evade the BHC Act's requirements. Based on a review of all the briefs and other submissions of Wilshire and Board counsel and all other relevant material, the Board is of the opinion that, based on the language of the BHC Act, its legislative history, and the purposes of the Act, the reservation of the right to prior notice did not alter the demand deposit classification of such deposits under federal banking law or cause TCNJ to cease to be a bank under the BHC Act, that Wilshire is and continues to be a bank holding company under the Act, and that Wilshire has violated the Act by failing to comply with the divestiture requirements of section 4(a)(2) of the Act on or before December 31, 1980.

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[3] Pursuant to the Agreement, the Board dismissed the civil money penalty assessment against Wilshire's officers and directors and Mr. Wilzig.

Appendix B

Statutory and Regulatory Framework. The BHC Act was enacted to prevent the concentration of commercial banking resources and to separate banking from commerce.[4] The Act defines a bank holding company as a company that controls a bank. 12 U.S.C. § 1841(a)(1). The Act defines a bank as an institution that (1) accepts deposits that the depositor has a legal right to withdraw on demand and (2) engages in the business of making commercial loans. 12 U.S.C. § 1841(c).

Section 4 of the Act generally prohibits a bank holding company from engaging, either directly or through a subsidiary, in any nonbank activities. 12 U.S.C. § 1843.[5] As originally enacted, the BHC Act applied only to companies that controlled two or more banks. 70 Stat. 133. Thus, companies that controlled only one bank (such as Wilshire) were not subject to the nonbank activity prohibition of section 4. In 1970, Congress amended the Act to apply to one bank holding companies. 84 Stat. 1760. Section 4(a)(2) of the Act, as amended, provides that such one bank holding companies must, by December 31, 1980 (ten years after enactment of the 1970 Amendments), divest their impermissible nonbank operations or cease to be bank holding companies. 12 U.S.C. § 1843(a)(2). Nothing in the BHC Act authorizes the Board to extend this 10-year divestiture period.

The Board is the only government agency charged with administration of the BHC Act. Section 5(b) of the Act authorizes the Board to issue such regulations and orders

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[4] S. Rep. No. 1095, 84th Cong., 1st Sess. 2 (1955).

[5] A bank holding company may engage in certain nonbank activities that the Board has determined to be so closely related to banking as to be a proper incident thereto. 12 U.S.C. § 1843(c)(8).

as may be necessary to carry out the purposes of the Act and to prevent evasions thereof. 12 U.S.C. § 1844(b).

Congress has prohibited federally insured banks from paying interest on any deposit that is payable on demand. 12 U.S.C. §§ 371a and 1828(g). Insured banks may pay interest on time and savings accounts, subject to maximum rate limitations set by federal regulation. 12 U.S.C. §§ 371b, 1828(b); Pub. L. No. 96-221, § 203, 94 Stat. 142. The regulations of the Board and the FDIC issued to implement these statutory provisions define the three basic categories of deposits. A demand deposit is defined as any deposit that is not a time or savings deposit. 12 C.F.R. §§ 217.1(a), 329.1(a). A savings deposit is generally defined as a deposit of one or more individuals, a not-for-profit corporation or organization, or of a for-profit corporation (if less than $150,000) where the depositor may be required to give not less than 14 days' prior notice of withdrawal, 12 C.F.R. §§ 217.1(e), 329.1(e)(1).[6] In order to maintain the distinction between savings deposits (on which interest is payable) and demand deposits (on which interest is not payable), the agencies have generally prohibited the making of withdrawals from interest-bearing savings deposits by means of negotiable orders or drafts (checks), the manner in which withdrawals are typically made from demand deposits. *See* 12 C.F.R. §§ 217.5, 329.5(c). Congress has recently permitted insured banks to permit withdrawals from interest-bearing deposits by negotiable instrument but only with respect to deposits of individuals and not-for-profit organizations. *See* Pub. L. No.

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[6] A savings deposit does not include a "time deposit," which is defined as a deposit that has fixed maturity or a required notice of not less than 14 days. 12 C.F.R. §§ 217.1(d), 329.1(d).

96-221, § 303, 94 Stat. 146.[7] Deposits of business organizations that are withdrawable by negotiable order are not classified as savings deposits. 12 C.F.R. §§ 217.1(e)(3), 329.1(e)(2); Board Counsel Reply Brief, Exhibit 1.

The Language of the BHC Act. Section 2(c) of the BHC Act defines a bank as "any institution organized under the laws of the United States, or any State of the United States . . . which (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans." 12 U.S.C. § 1841(c).

TCNJ is chartered as a bank under the laws of New Jersey and its deposits are insured by the FDIC. There is no question that TCNJ "engages in the business of making commercial loans." The question presented for resolution is whether TCNJ is a bank that accepts deposits that its depositors have a legal right to withdraw on demand. Prior to November 20, 1980, TCNJ concededly offered to customers demand deposit accounts that could be withdrawn on demand. On November 5, 1980, TCNJ advised its depositors that, effective November 20, 1980, TCNJ henceforth would reserve the right to require 14 days' prior notice before withdrawal could be made from transactional accounts.[8] It is Wilshire's position that this reservation is part of the deposit contract and denies TCNJ's customers any legal right to withdraw deposits on demand because of TCNJ's right to require prior notice of withdrawal. In

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[7] Interest-bearing deposits that may be accessed by negotiable order are commonly referred to as "NOW accounts."

[8] This notice effectively applied only to TCNJ's demand deposits, since TCNJ was already *required* by the FDIC's regulations to reserve the right to at least 14 days' prior notice of withdrawal with respect to TCNJ's savings deposits, on which TCNJ pays interest. 12 C.F.R. § 329.1(d), (e).

the Board's view, however, Wilshire has failed to demonstrate conclusively that the holders of TCNJ's checking deposits, who prior to November 20, 1980, undisputedly held a legal right to make withdrawals from such accounts on demand, have lost all legal right to withdraw on demand by reason of TCNJ's reservation of a right to require advance notice of withdrawal. The notice TCNJ sent to its depositors announcing the reservation stated that TCNJ "has no intention of exercising" the notice provision. It is evident that TCNJ's disclaimer of intention to assert any right to prior notice of withdrawal was made to induce its checking account depositors not to withdraw their deposits after TCNJ's purported alteration of the terms of the deposit contract. Indeed, it appears that a depositor who relies to his detriment on TCNJ's representation of intent not to invoke the prior notice requirement may have a legally enforceable right in a court of law (on a breach of contract theory or on general equitable principles) to prevent TCNJ from asserting any prior notice requirement. *See* Restatement (Second) of Contracts § 90. In such a case, the depositor would have a legal right to withdraw such deposits on demand within the literal meaning of section 2(c), notwithstanding the purported reservation of a right to prior notice of withdrawal.[9]

In interpreting the meaning of the term "bank" as used in a federal statute such as the BHC Act, the Board is not

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[9] The Board is aware that banks and other depository institutions are required to reserve the right to 14 days' advance notice of withdrawal from savings accounts and that in practice such notice is not ordinarily required. The Board is not aware that depository institutions furnish savings account customers with *notice* that the institution does not intend to require such advance notice. Indeed, institutions are required to reserve this right in order for the deposit to be a savings deposit. *E.g., Published Interpretations* ¶ 3075.

bound by the labels that parties to a private contract may place on a transaction or by the superficial form of the activity involved; rather the Board must look to the underlying substance of the transaction to determine if the activity comes within the meaning and purposes of the Act. *See First National Bank in Plant City* v. *Dickinson,* 396 U.S. 122, 137 (1969); *Independent Bankers Association of America* v. *Smith,* 534 F.2d 921, 951 (D.C. Cir.), *cert. denied,* 429 U.S. 862 (1976).[10] Wilshire argues that TCNJ's reservation of the right to 14 days' prior notice of withdrawal with respect to its deposits that the depositor had a legal right to withdraw on demand transforms these deposits in substance into savings deposits. The Board finds that the retention of a right to prior notice does not convert deposits covered by section 2(c)(1) of the Act into a savings deposit.

Congress has prohibited federally insured commercial banks from paying interest on deposits that are payable on demand. 12 U.S.C. §§ 371a, 1828(g). However, commercial banks may pay interest, subject to maximum rate limitations imposed by federal regulation, on time and savings accounts. 12 U.S.C. §§ 371b, 1828(g). The Board and the FDIC have issued regulations defining these three basic classifications of deposits that commercial banks accept. A demand deposit (*i.e.*, any deposit payable on demand) is defined to include any deposit that is not a time or savings deposit. 12 C.F.R. § 217.1(a), 329.1. A sav-

[10] Wilshire contends that the teaching of the Supreme Court in the *Plant City* case is inapplicable here because in *Plant City* the question involved the meaning of the term "branch", a matter of federal, not state, law. However, it is clear that the meaning of the statutory language in the definition of "bank" in the BHC Act is likewise a matter of federal, not state law. *See Clearfield Trust Co.* v. *United States,* 318 U.S. 363 (1943).

ings deposit is a deposit of one or more individuals or a not-for-profit organization or of a for-profit organization if less than $150,000 where the depositor may be required to give not less than 14 days' prior notice of withdrawal. 12 C.F.R. §§ 217.1(e), 329.1(e)(1). Federal law permits the payment of interest on such accounts, and depository institutions typically do pay interest on savings accounts. However, TCNJ does not pay interest on its "transaction accounts." [11]

Moreover, while Congress has authorized depository institutions to permit withdrawals from savings accounts by means of negotiable orders (checks), only individuals and certain not-for-profit organizations may exercise such rights. Pub. L. No. 96-221, § 303, 94 Stat. 146. The Board's regulations provide that any deposit (whether or not interest-bearing) held by a for-profit organization that may be accessed by a negotiable order is not a savings deposit. 12 C.F.R. § 217.1(e)(3). The FDIC's regulations do not contemplate that commercial banks may permit the withdrawal by business organizations from savings deposits by negotiable instrument. 12 C.F.R. § 329.1(e)(2), 329.5 (c).[12] Thus, because TCNJ's transaction accounts are offered to for-profit corporations and other organizations and because TCNJ permits withdrawal from such accounts by

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[11] Although no law requires commercial banks to pay interest on savings accounts, the fact that TCNJ does not pay interest on deposits on which it asserts (albeit erroneously) that interest may lawfully be paid indicates that, in substance, TCNJ's transaction accounts are indistinguishable from accounts payable on demand, on which the payment of interest is prohibited.

[12] By letter dated March 3, 1981, the FDIC's General Counsel stated that under the FDIC's regulations and federal law no insured nonmember bank is authorized to permit any withdrawal from a noninterest-bearing savings account by means of a negotiable instrument. Board Counsel Reply Brief, Exhibit 1.

negotiable order, the transaction accounts are not "savings accounts" under the relevant regulations [13] and are demand deposits under such regulations.

Legislative history. The legislative history of the definition of "bank" in section 2(c) of the BHC Act demonstrates that the definition was crafted specifically to cover commercial banks. A "bank" is defined in terms designed to implement the fundamental purposes for which the BHC Act was enacted: to prevent concentration of control of commercial bank credit and to separate commercial banking from commerce.[14] The legislative history indicates that Congress intended commercial banking to include a bank that makes commercial loans and that accepts noninterest-bearing deposits (including deposits of commercial organizations that are withdrawable by negotiable instrument). As originally enacted in 1956, the BHC Act defined "bank" to include national banks, State banks, savings banks, and trust companies.[15]

In 1966, Congress amended the definition of "bank" to provide that a bank included any institution that accepts deposits that the depositor has a legal right to withdraw on demand. The amendment was made at the request of the Board in order to eliminate from coverage savings banks, industrial banks, and nondeposit trust companies, all of which were considered "banks" under the BHC Act of 1956.

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[13] The transaction accounts are not time deposits. A time deposit is defined as a deposit that has a fixed maturity or a required notice period of 14 days or more, but does not include a deposit where the bank merely reserves the right to require notice of 14 days or more prior to withdrawal. 12 C.F.R. § 217.1(d), 329.1(d). TCNJ's transaction accounts have no fixed maturity and do not require that prior notice of withdrawal must be given.

[14] S. Rep. No. 1095, 84th Cong., 1st Sess. 2 (1955); H. Rep. No. 609, 84 Cong., 1st Sess. 7, 16 (1955).

[15] 70 Stat. 133.

This was accomplished by redefining "bank" as ". . . an institution that accepts deposits payable on demand (checking accounts), the commonly accepted test of whether an institution is a commercial bank. . . ." S. Rep. No. 1179, 89th Cong., 2d Sess. 7 (1966). Thus, Congress intended the BHC Act to apply to an institution that accepts checking accounts, including those of business organizations.

In 1970, Congress again amended the definition of "bank" under the BHC Act at the Board's request. Again the amended language, which is the current definition of bank under the BHC Act, was designed to exclude institutions that are not engaged in the business of commercial banking. The Senate report contained the following statements:

> The definition of "bank" adopted by Congress in 1966 was designed to *include commercial banks and exclude those institutions not engaged in commercial banking,* since the purpose of the act was to restrain undue concentration of commercial banking resources and to prevent possible abuses related to the control of commercial credit. (emphasis added).[16]

Thus, the legislative history of the BHC Act shows a congressional intent to define "bank" as a commercial bank for purpose of the BHC Act, *i.e.,* an institution that accepts checking accounts and makes commercial loans. Both in 1966 and 1970, the only financial institutions to offer deposit accounts accessible by check (with the exceptions of those the amendments were designed expressly to exclude) were commercial banks.

TCNJ is chartered as a commercial bank and advertises itself as such (Board Exhibits 3 and 4). TCNJ is authorized to and does engage in the business of making commercial

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[16] S. Rep. No. 91-1084, 91st Cong., 2d Sess. 24 (1970).

loans and accepting deposits from corporations and other business entities that are in fact payable on demand through corporate checking accounts.[17] Moreover, TCNJ continues to possess the legal authority to accept deposits that the depositor has a legal right to withdraw on demand. The reservation of a right to prior notice of withdrawal in no way alters TCNJ's operations and does not in fact or law render it a "nonbank" under the BHC Act. TCNJ is a commercial bank that accepts commercial deposits that are payable on demand and serves as a source of commercial credit.

Purposes of the BHC Act. Wilshire maintains that the Board, in interpreting the meaning of "bank" in section 2(c) of the BHC Act may not go beyond the literal terms of the statute. As noted above, a literal interpretation of the definition of demand deposit in section 2(c) does not necessarily compel the conclusion that TCNJ is no longer a bank for purposes of the Act. In any event, the Board believes that, while the language of the statute is the proper starting point, any inquiry into the meaning of "bank" may properly consider the context in which particular language is employed in the Act as a whole as well as the overall purposes of the Act.[18] Moreover, a literal interpretation of statutory language is inappropriate where such a reading would require results that would frustrate the purposes of the statute.[19]

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[17] TCNJ's report of condition for the last quarter of 1980, filed on January 27, 1981, lists deposits held in demand accounts. (Board Exhibit 1, R. 102). Deposit slips of TCNJ refer to "checking accounts." (Board Exhibit 4).

[18] *E.g., United States* v. *American Trucking Associations,* 310 U.S. 534, 542-543 (1940).

[19] *Train* v. *Colorado Public Interest Research Group,* 426 U.S. 1, 9-10, 23-24 (1975); *New York State Department of Social Services* v. *Dublino,* 413 U.S. 405, 420 (1973).

Appendix B

Viewed in light of the purposes of the Act—to sever relationships between commercial banks and nonbank business and to prevent abuses related to the control of commercial credit—TCNJ's reservation with respect to its demand deposits of a right to prior notice of withdrawal is ineffective to terminate its status as a bank under the BHC Act. Indeed, it is evident that the sole purpose of such reservation was to enable Wilshire to evade the requirements of the Act and in particular to permit Wilshire to escape the Act's mandate that Wilshire immediately separate its banking and industrial activities. The reservation of the right to prior notice has resulted in no change whatsoever in the operation of TCNJ's demand deposits. The deposits remain noninterest-bearing, are in fact payable on demand, and are withdrawable by business depositors by negotiable order. While federally-insured banks and other depository institutions are required by federal law to reserve the right to prior notice of withdrawal with respect to savings account (on which interest may be paid), federal law does not require TCNJ to reserve a similar right with respect to its transaction accounts, because TCNJ does not pay interest on such accounts. Accordingly, the only purpose of such a reservation by TCNJ is to enable Wilshire to evade (and thus to frustrate) the requirements of the BHC Act.

Moreover, any determination by the Board to the effect that TCNJ's notice to its demand deposits customers terminates TCNJ's status as a bank under the BHC Act would serve to nullify the entire regulatory framework of that Act. If a bank holding company is permitted to escape its obligations under the Act without making any functional change in its operations simply by causing its subsidiary bank(s) to send a notice to customers holding demand deposits reserving a right to notice of prior withdrawal, circumvention

of the Act's substantive requirements on a large scale is likely.[20]

Section 5(b) of the BHC Act authorizes the Board to issue such regulations and orders as may be necessary to "carry out the purposes" of the Act and "to prevent evasions thereof." 12 U.S.C. § 1844(b). This provision enables the Board to prohibit activities that are technically outside the literal terms of the Act in order to prevent a clear evasion of the purposes of the Act. *See Gemsco, Inc.* v. *Walling,* 324 U.S. 224, 255 (1945); *Mourning* v. *Family Publications Service, Inc.,* 411 U.S. 356, 371 (1973).

With respect to Wilshire and its continued affiliation with TCNJ, the Board is without question empowered by section 5(b) to act by order to prevent an evasion of the BHC Act by means of a nonsubstantive, ineffective reservation of the right to require notice of withdrawal, the sole purpose of which is to enable Wilshire to escape the requirements of the Act.

Therefore, having considered all the facts of record in this case,[21] the Board has determined (1) that TCNJ is a

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[20] The Board believes that it is unlikely that Congress would be indifferent, in light of recent deregulation legislation affecting the banking industry, to the potential nullification of the BHC Act if Wilshire were to prevail here. It is well established that Congress is not presumed to repeal existing enactments by implication. *Morton* v. *Mancari,* 417 U.S. 535, 550-551 (1974). Nor would a finding that TCNJ continues to be a bank for purposes of the Act mean, as Wilshire claims, that thrift institutions would become banks under the Act. TCNJ is not, and does not claim to be, a thrift institution, which engages in substantially different activities than those of TCNJ. For example, thrift institutions typically pay interest on all deposits, may not offer checking accounts to business organizations, and are severely limited in their commercial lending functions.

[21] Wilshire has requested the opportunity to present oral argument before the Board on this matter. Wilshire has no right under the Board's Rules of Practice (12 C.F.R. § 263.14) or any other law to oral argument. The Board believes that the numerous submissions

(footnote continued on following page)

"bank" within the meaning of the section 2(c) of the BHC Act because it accepts deposits that the depositor has the legal right to withdraw on demand and engages in the business of making commercial loans; (2) that Wilshire is a bank holding company by virtue of its ownership of over 90 per cent of the shares of TCNJ; and (3) that Wilshire's retention of the shares of TCNJ beyond December 31, 1980, resulted in and continues to be a violation of section 4(a)(2) of the BHC Act. Accordingly, under section 5(b) of the BHC Act (12 U.S.C. § 1844(b)) and section 8(b)(1) of FISA (12 U.S.C. § 1818(b)(1)), it is hereby ordered that Wilshire and its directors, officers, employees and agents, and other persons participating in the conduct of Wilshire's affairs cease and desist from Wilshire's violation of the BHC Act and take action to bring Wilshire into compliance with the BHC Act. Such compliance shall be in accordance with the Agreement contained in the Appendix attached hereto.[22]

By Order of the Board of Governors of the Federal Reserve System, effective April 2, 1981.

(signed) James McAfee

. . . . . .

James McAfee
Assistant Secretary of the Board

Attachment

[SEAL]

(footnote continued from preceding page)

by the parties in this case have adequately illuminated the narrow issues involved. Accordingly, Wilshire's request for oral argument is denied.

[22] The effectiveness of the divestiture requirements of this Order will be stayed under the terms and conditions provided for in the Agreement, *i.e.*, that Wilshire seeks judicial review of the Order as prescribed in the Agreement.

Appendix B

BEFORE THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

WASHINGTON, D.C.

Docket No. 1110026

Agreement Entered Into Upon Consent Pursuant to the Financial Institutions Supervisory Act of 1966, as amended, and the Bank Holding Company Act of 1956, as amended.

In the Matter of

WILSHIRE OIL COMPANY OF TEXAS, JERSEY CITY, NEW JERSEY

and

MR. SIGGI B. WILZIG

WHEREAS, the Board of Governors of the Federal Reserve System ("Board") issued, pursuant to section 8(b)(1) and 8(b)(3) of the Financial Institutions Supervisory Act of 1966, as amended ("FISA") (12 U.S.C. §§ 1818(b)(1) and (3)), a Notice of Charges and of Hearing ("Notice of Charges"), dated December 9, 1980, against Wilshire Oil Company of Texas, Jersey City, New Jersey ("Wilshire"), as well as its directors and certain officers, including Mr. Siggi B. Wilzig, for alleged violations of section 4(a)(2) of the Bank Holding Company Act ("BHC Act") (12 U.S.C. § 1843(a)(2)), arising out of Wilshire's stated intent to retain beyond December 31, 1980, control of Trust Company of New Jersey, Jersey City, New Jersey ("TCNJ"), and Wilshire's nonbanking activities;

Appendix B

WHEREAS, on November 3, 1980, Wilshire notified the Board of Wilshire's position, taken on advice of counsel, that TCNJ's reservation, effective on and after November 20, 1980, of the right to require 14 days' advance notice of withdrawal from its depositors caused TCNJ to cease being a bank within the meaning of section 2(c) of the BHC Act (12 U.S.C. § 1841(c)) and Wilshire to cease being a bank holding company within the meaning of section 2(a) of the BHC Act (12 U.S.C. § 1841(a));

WHEREAS, on November 17 and 28, 1980, the Board advised Wilshire of the Board's position that TCNJ had not ceased to be a bank within the meaning of section 2(c) of the BHC Act as a result of TCNJ's reservation of the right to require 14 days' advance notice of withdrawal from its accounts, and that Wilshire remained a bank holding company under the BHC Act;

WHEREAS, having been advised by the Board's staff of the Board's position that its November 28 letter constituted an "order" within the meaning of section 9 of the BHC Act (12 U.S.C. § 1848), Wilshire, on December 24, 1980, petitioned for review of the Board's November 28 letter in the United States Court of Appeals for the District of Columbia Circuit;

WHEREAS, during the month of December, 1980, representatives of the Board and Wilshire engaged in discussions aimed at agreeing to an arrangement of the relationships between Wilshire and TCNJ under the BHC Act, and whereas said discussions continued until December 31, 1980, when they terminated without the parties reaching an agreement;

WHEREAS, on December 31, 1980, Wilshire's board of directors approved a corporate resolution providing for

a Trust Agreement of even date (of which a copy is appended hereto as Exhibit A) with the Honorable Richard J. Hughes, as Trustee;

WHEREAS, on December 31, 1980, Wilshire commenced an action against the Board in the United States District Court for the District of New Jersey seeking declaratory judgment with respect to TCNJ's and Wilshire's status under the BHC Act and injunctive relief against the Board's proceeding on its Notice of Charges;

WHEREAS, on January 6, 1981, the Board issued an Amended Notice of Charges and of Hearing pursuant to FISA ("Amended Notice of Charges") and a Notice of Assessment of Civil Money Penalty pursuant to section 8(b) of the BHC Act ("Notice of Assessment") against Wilshire and its directors and certain officers and Mr. Wilzig;

WHEREAS, a formal administrative hearing had been scheduled on the Amended Notice of Charges and on the Notice of Assessment for February 19, 1981, at the Federal Reserve Bank of New York ("Reserve Bank");

WHEREAS, on February 12, 1981, the board of directors of Wilshire, at a duly constituted meeting held pursuant to the Articles of Incorporation and By-Laws of Wilshire, authorized and directed the Chairman or President of Wilshire to enter into this Agreement on behalf of Wilshire and consented to compliance by Wilshire and its directors, officers, agents and employees with the provisions of this Agreement;

NOW THEREFORE, for the purpose of providing for a prompt resolution of the issue in dispute between the parties regarding TCNJ's and Wilshire's status under the BHC Act:

Appendix B

IT IS HEREBY AGREED by and among the Board, Wilshire and Mr. Siggi B. Wilzig as follows:

1. The proceedings instituted by the Notice of Charges and the Amended Notice of Charges shall be expedited by consent of both Wilshire and the Board as follows:

(a) The parties agree that the sole issue between the parties is the legal issue whether TCNJ is a bank under the BHC Act and Wilshire is a bank holding company under the BHC Act and whether TCNJ's reservation of the right to 14 days' advance notice of withdrawal from deposits at TCNJ caused TCNJ to become a nonbank for purposes of the BHC Act. The parties agree that there are no material questions of fact in dispute that would necessitate an administrative hearing on the issue between the parties.

(b) Wilshire hereby waives all rights to a formal administrative hearing on the Amended Notice of Charges under the provisions of sections 8(b)(1) and (h) of FISA (12 U.S.C. § 1818(b)(1) and (h)), the BHC Act, and the Board's Rules of Practice for Hearings ("Rules of Practice") (12 C.F.R. Part 263).

(c) Wilshire hereby waives all rights to consideration of, and a recommended decision on, the issue of TCNJ's and Wilshire's status under the BHC Act by an Administrative Law Judge and to the provisions in the Administrative Procedure Act (5 U.S.C. § 556) and section 263.11 of the Board's Rules of Practice relevant to such consideration and recommendation. Wilshire consents to participation in the Board's decision under paragraph 1(f) below by employees or agents of the Board who have engaged in the per-

formance of investigative or prosecuting functions in this matter, notwithstanding the provisions of 5 U.S.C. § 554(d) and section 263.6 of the Board's Rules of Practice.

(d) Wilshire and the Board agree that the issue between the parties regarding TCNJ's and Wilshire's status under BHC Act shall be submitted directly to the Board for its consideration.

(e) Wilshire and Board counsel shall, within 15 calendar days of the date of this Agreement, file with the Board a brief or memorandum, together with supporting affidavits or documents, setting forth their respective positions concerning the issue between the parties. An answering brief or memorandum, together with supporting affidavits or documents, may be submitted by Wilshire and Board counsel, and, if submitted, shall be filed within 10 calendar days after service of the opening briefs or memoranda.

(f) Within 30 calendar days of the receipt of Wilshire's and Board counsel's opening briefs or memoranda, the Board shall consider the materials filed by Wilshire and Board counsel, and shall issue an Order in accordance with sections 8(b) and (h) of FISA and section 5 of the BHC Act concerning Wilshire's and TCNJ's status under the BHC Act and Wilshire's compliance or noncompliance with the provisions of section 4(a)(2) of the BHC Act. Such Order shall be based upon the record herein, shall set forth the reasons and basis for the Board's decision, shall constitute final Board action on the Amended Notice of Charges and TCNJ's and Wilshire's status under the BHC Act, and shall be reviewable exclusively as provided for herein.

(g) In the event the Board determines that TCNJ is a bank under the BHC Act and Wilshire has not complied with the divestiture requirements of section 4(a)(2) of the BHC Act, the Board will issue an Order pursuant to section 8(b)(1) of FISA and section 5(b) of the BHC Act requiring Wilshire and its directors, officers, employees and agents and other persons participating in the conduct of Wilshire's affairs to cease and desist from Wilshire's violation of the BHC Act and to take action to bring Wilshire into compliance with the BHC Act. Such compliance shall be accomplished in accordance with paragraphs 4 and 5 of this Agreement.

(h) In the event that the Board determines that TCNJ is no longer a bank under the BHC Act and that Wilshire is no longer a bank holding company under the BHC Act, the Board will issue an Order so providing, and such Order shall be final and binding upon the parties to this Agreement.

2. In the event the Board issues an Order, under paragraph 1(g) above, that is adverse to Wilshire and Wilshire desires to seek judicial review of such Order, Wilshire and the Board agree to expedite judicial review of that Order as follows:

(a) Wilshire shall, within 5 business days of the entry of such Board Order, petition an appropriate United States Court of Appeals ("Court of Appeals"), for review of such Board Order. The petition shall be filed pursuant to sections 8(h) of FISA (12 U.S.C. § 1818(h)) and section 9 of the BHC Act (12 U.S.C. § 1848).

(b) Wilshire shall petition the Court of Appeals for expedited consideration of the petition for review, and the Board shall join in said petition. Wilshire agrees that it will not file any additional petition or complaint regarding the status of TCNJ or Wilshire under the BHC Act with that Court or any other court.

(c) Wilshire and the Board shall each file all briefs and other documents required to be filed with the Court of Appeals within the time periods provided in the Federal Rules of Appellate Procedure and any expedited briefing schedule established by the Court of Appeals.

(d) If the Court of Appeals sustains the Board Order and Wilshire desires to seek further judicial review, Wilshire shall petition the United States Supreme Court for a writ of certiorari within 45 calendar days of the date of the decision of the Court of Appeals. Wilshire will not seek rehearing or reconsideration of any decision by the United States Supreme Court. Nothing in this Agreement shall be construed to prevent the Solicitor General from petitioning the United States Supreme Court for a writ of certiorari on behalf of the Board.

(e) Within 3 business days of execution of this Agreement, Wilshire and the Board agree to sign and file with the clerk of the United States Court of Appeals for the District of Columbia Circuit an agreement, in the form annexed hereto as Exhibit B, that the proceeding commenced by Wilshire's petition for review dated December 24, 1980 (No. 80-2568) be dismissed, without costs to either party, pursuant to Fed. R. App. P. 42(b). Wilshire agrees to pay what-

ever fees are due to the clerk in connection with that filing.

(f) Within 3 business days after receiving notice of the entry of dismissal in the D.C. Circuit as provided for by paragraph 2(e) above, Wilshire shall file a Notice of Dismissal of its action as against the Board in the United States District Court for the District of New Jersey (No. 80-4156).

(g) The parties agree to attempt to obtain a prompt resolution of the issue between the parties; however, the time limits referred to in paragraphs 1 and 2 herein may be extended for good cause by agreement of the parties, or by order of the Court of Appeals or the Supreme Court.

3. In the event the Board issues an Order under paragraph 1(g) above and Wilshire petitions for review of that Order as provided for herein, the Board will stay the effectiveness of the divestiture requirements of said Order pending the completion of judicial review of the Order in an appropriate U.S. Court of Appeals as provided in 12 U.S.C. §§ 1818(h) and 1848 and pending the completion of any proceedings in the United States Supreme Court.

4. In the event that Wilshire does not petition for review of any Board Order issued under paragraph 1(g) above within the time period provided in paragraph 2 herein, or in the event that any Board Order adverse to Wilshire with respect to TCNJ's and Wilshire's status under the BHC Act becomes final through a final judicial decision as provided for in paragraph 2 herein, or otherwise becomes final, Wilshire shall, within six months of the date of such finality, divest its banking or nonbanking shares, assets and

activities in a manner then complying with the provisions of the BHC Act and the Board's regulations. Such a divestiture shall be consummated in a transaction or transactions satisfactory to the Board's General Counsel under the provisions of the BHC Act, including Section 2(g) of the BHC Act (12 U.S.C. § 1841(g)), and the Board's regulations (including 12 C.F.R. § 265.2(b)(1) (1980)) and interpretations (including 12 C.F.R. § 225.138 and 225.139), and the decision of the Board's General Counsel with respect to the effectiveness of the divestiture shall be subject to judicial review only for an abuse of discretion.

5. In the event that Wilshire fails to make a divestiture as required by paragraph 4 above, the Trustee of the shares of TCNJ (as described in paragraph 7 below), or his successors, shall promptly sell, by public auction if necessary, or otherwise dispose of, including by a distribution on a *pro rata* basis to Wilshire's shareholders, the shares or assets of TCNJ. The Trustee's sale or disposition shall be completed no later than eight months after the date of the entry of the Board's Order under paragraph 1(g) above in the event Wilshire does not petition for review of such Order or within eight months of the date that the Board's Order becomes final through a final judicial decision as provided for in paragraph 2 above, or otherwise becomes final. The Trustee's sale or disposition shall be consummated in a transaction or transactions satisfactory to the Board's General Counsel under the provisions of the BHC Act, including section 2(g) of the BHC Act, and the Board's regulations (including 12 C.F.R. § 265.2(b)(1) (1980)) and interpretations (including 12 C.F.R. §§ 225.138 and 225.139), and the decision of the Board's General Counsel with respect to the effectiveness of the Trustee's sale or disposition shall be subject to judicial review only for an

abuse of discretion. Wilshire shall amend the Trust Agreement dated December 31, 1980 to authorize and instruct the Trustee to make the divestiture in accordance with this paragraph 5.

6. Except as otherwise provided in this Agreement, the operations of Wilshire and TCNJ shall be conducted separately and independently of each other unless TCNJ is held to be a nonbank under the BHC Act by a decision of the Board or in the final judicial decision in the proceedings provided for in paragraph 2.

7. All of Wilshire's right, title and interest in TCNJ's shares shall be held by the Honorable Richard J. Hughes, as trustee ("Trustee"), pursuant to a Trust Agreement dated December 31, 1980, as amended, between Wilshire and said Trustee. The Trustee shall be free of and independent from any control or influence by Wilshire, any of its subsidiaries, directors, officers, employees or agents or other persons participating in the conduct of the affairs of Wilshire. Should it be necessary for Wilshire to appoint a successor trustee of the shares of TCNJ, that appointment shall be subject to prior approval by the Federal Reserve Bank of New York.

8. Within 60 days of this Agreement, Wilshire shall take such steps as are necessary to remove all encumbrances from the TCNJ shares, including all liens and pledges on those shares, and shall convey such shares to the Trustee to ensure that said shares are available for sale or disposition by the Trustee in accordance with paragraph 5 of this Agreement; *provided,* however, that former lienholders or pledgees may retain the option to be repaid out of the proceeds, if any, of the Trustee's sale or disposition of those shares.

9. The transfer of Wilshire's right, title and interest in TCNJ's shares to the trustee on December 31, 1980, does not constitute an effective divestiture of Wilshire's interest in TCNJ under the BHC Act, and Wilshire is deemed to continue to hold and control those shares so transferred.

10. The Board of Directors of Wilshire shall adopt a corporate resolution which provides that, except as otherwise provided in this Agreement:

(a) Wilshire shall not borrow any funds from TCNJ, nor charge TCNJ any management fees. Wilshire shall repay within 90 days of this Agreement any loans or extension of credit to it currently outstanding from TCNJ. Wilshire shall not engage the services of, nor provide any compensation to, any officer, director, employee or agent of TCNJ for services rendered after December 31, 1980, it being understood that stock options for Wilshire stock, which have been granted but remain unexercised, and which were granted to TCNJ employees in respect of services rendered on or before December 31, 1980, shall not constitute "compensation" within the meaning of this sentence when and if they are exercised in the future.

(b) Neither Wilshire nor its board of directors shall exercise or attempt to exercise control or influence over the management, policies or affairs of TCNJ.

(c) No officer, director, employee, or agent of Wilshire, nor other person participating in the conduct of Wilshire's affairs, except for independent professionals (such as lawyers, accountants, and insurance brokers) acting solely in performance of their professional responsibilities, shall participate in or influence in any manner the management, operations or conduct of the

affairs of TCNJ. Wilshire shall not allow any officer, director, employee, or agent of TCNJ, or other person participating in the conduct of TCNJ's affairs, except for independent professionals (such as lawyers, accountants, and insurance brokers) acting solely in performance of their professional responsibilities, to participate in any manner in the management, operations, policies, or conduct of the affairs of Wilshire. Wilshire may request information from TCNJ as required by Wilshire for the preparation of reports to government agencies and financial reports.

11. Except as otherwise provided herein, Mr. Siggi B. Wilzig shall not participate in any manner in the operations, management, policies or conduct of the affairs of Wilshire, including acting as a shareholder representative or adviser. As a shareholder of Wilshire, Mr. Wilzig may receive the same information as is provided to all other shareholders of Wilshire. Mr. Wilzig may serve as an adviser to Wilshire, including solicitation of proxies, for purposes of effecting the complete divestiture of all of Wilshire's oil and gas assets in accordance with paragraph 4 of this Agreement. Except as otherwise provided herein: (1) Mr. Wilzig shall not communicate with the management, directors, officers, employees or agents of Wilshire about the operations, management, policies or affairs of TCNJ or Wilshire, except that Mr. Wilzig may provide information regarding the affairs of TCNJ as required by Wilshire for the preparation of reports to government agencies and financial reports; and (2) Mr. Wilzig shall not initiate any communication with shareholders of Wilshire. Wilshire shall provide the Reserve Bank with monthly reports which describe the communications, if any, between Mr. Wilzig and Wilshire. Within 10 calendar days of this Agreement, Wilshire shall publish in the *Wall Street Journal*

a notice to shareholders, in the form annexed hereto as Exhibit C, similar in size and all other respects to the notice published by Wilshire in the *Wall Street Journal* on February 6, 1981, describing the terms of this Agreement (including Mr. Wilzig's commitment hereunder), providing that all letters or calls for further information should be directed to Wilshire's Stockholder Relations Department, and signed by Wilshire's Chairman.

12. For the purpose of overseeing and reviewing compliance with the terms of this Agreement, representatives of the Board or the Reserve Bank may examine the files and records of Wilshire at any time during business hours, and may meet with the Trustee or the board of directors of Wilshire at any reasonable time.

13. In the event: (1) that the Board issues an Order under paragraph 1(g) above adverse to Wilshire; and (2) that either (a) Wilshire does not petition for review of such an adverse Order as provided for in paragraph 2 herein, or (b) Wilshire does petition for review of such an adverse Board Order and fails to obtain a final judicial decision overturning such an adverse Order with respect to TCNJ's and Wilshire's status under the BHC Act, Wilshire shall pay to the Board the amount of $1,000 per day for each day of the period commencing on January 1, 1981, and ending on the date of compliance by Wilshire with paragraphs 4 and 5 of this Agreement. The payment provided for by this paragraph shall be remitted by Wilshire to the Board in two installments. The first installment shall cover the period from January 1, 1981, through the date that any Board Order adverse to Wilshire and issued under paragraph 1(g) above shall become final, and shall be remitted by Wilshire to the Board within ten calendar days of said date. The second installment shall cover the period from

the date that any Board Order adverse to Wilshire and issued under paragraph 1(g) above shall become final until the date of compliance by Wilshire with paragraphs 4 and 5 of this Agreement, and shall be remitted by Wilshire to the Board within five business days of the date of such compliance, but in no event later than eight months after a Board Order adverse to Wilshire and issued under paragraph 1(g) above shall become final.

14. Within three business days of the date of this Agreement, Wilshire shall withdraw its request for a formal hearing on the Notice of Assessment of Civil Money Penalty against Wilshire issued by the Board on January 6, 1981. Wilshire shall not contest administratively nor seek judicial review of the payment provided for by paragraph 13 of this Agreement.

15. Within three business days of the date of this Agreement, the Board will withdraw, with prejudice, that portion of its Notice of Assessment of Civil Money Penalty issued on January 6, 1981, against the directors and certain officers of Wilshire and Mr. Wilzig. The Board will also withdraw, with prejudice, that portion of its Amended Notice of Charges seeking an additional payment by Wilshire to the Board in excess of the civil money penalty of $1,000 per day provided for by the BHC Act.

16. The Board reserves the right to institute cease and desist proceedings or to assess civil money penalties, pursuant to FISA or the BHC Act, against Wilshire or Mr. Siggi B. Wilzig or any of Wilshire's subsidiaries or directors, officers, or agents or other persons participating in the conduct of affairs of Wilshire for violations of any provisions of this Agreement or any other provision of the BHC Act or FISA.

17. This Agreement is a cease and desist order which has become final within the meaning of 12 U.S.C. § 1818 (k) and is enforceable in the United States District Court, pursuant to the provisions of section 8(i) of FISA (12 U.S.C. § 1818(i)), and against the Board in the United States District Court.

18. The provisions of this Agreement shall be binding upon the Board, Wilshire, Mr. Wilzig, Wilshire's subsidiaries, and their respective members, officers, directors, agents, or employees in their capacities as such, upon any other persons participating in the conduct of the affairs of Wilshire, and upon any successor or assign by merger, acquisition or otherwise. The provisions of paragraphs 5 and 7 of this Agreement shall be binding upon the Trustee under the Trust Agreement dated December 31, 1980, as amended, and his successors.

19. The provisions of this Agreement are subject to the provisions of any applicable public or private law hereafter enacted by Congress.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed as of the 18th day of February, 1981.

Board of Governors of the
Federal Reserve System

By /s/ THEODORE E. ALLISON
Theodore E. Allison

Siggi B. Wilzig

Wilshire Oil Company of
Texas

By /s/ NATHAN WHITE 2/13/81
Chairman or President

Appendix B

The undersigned, being all the directors of Wilshire Oil Company of Texas, hereby acknowledge that they have read and have consented to this Agreement and that they voted in favor of the resolution of Wilshire authorizing its execution.

NATHAN WHITE 2/13/81

....

Director Director

ERNEST WACHTEL 2/13/81

....

Director Director

....

Director Director

The undersigned Trustee under the Trust Agreement dated December 31, 1980, as amended, hereby accepts, agrees to, and will comply with, the provisions of paragraphs 5 and 7 of this Agreement.

.....

Richard J. Hughes
Trustee

Appendix B

Draft of
December 31, 1980

TRUST AGREEMENT, dated as of December 31, 1980, between WILSHIRE OIL COMPANY OF TEXAS ("Wilshire") and RICHARD J. HUGHES as Trustee (the "Trustee").

WITNESSETH

WHEREAS, Wilshire owns 952,907 shares of common stock of the Trust Company of New Jersey (the "Stock"); and

WHEREAS, Wilshire is hereby delivering the Stock to the Trustee on the terms and conditions hereinafter set forth;

NOW, THEREFORE, in consideration of the premises herein contained, the parties hereto agree as follows:

1. Wilshire hereby irrevocably assigns and transfers all its rights, title and interest in the Stock to the Trustee subject to the conditions hereinafter set forth. All dividends received on the Stock and any proceeds received from a sale of the Stock shall be promptly distributed by the Trustee to Wilshire.

2. Wilshire shall institute legal action to determine whether it remains subject to the Bank Holding Company Act of 1956, as amended (the "Act"). In the event of a final judicial decision that Wilshire is not a bank holding company, or any other action that results in Wilshire not being subject to the Act or not required to divest the Stock or its nonbanking operations until a later date, this trust shall immediately terminate and all the Trustee's right, title and interest to the Stock shall revert to Wilshire.

Appendix B

3. In the event that there is a final judicial determination that Wilshire remains a bank holding company, Wilshire will attempt to sell its oil and gas operations in a manner which insures compliance with the Act. If such operations are sold, the trust shall immediately terminate as aforesaid. If such operations are not sold within five months from the date of the final judicial determination, the Trustee shall dispose of the Stock as soon as practicable in a manner which insures compliance with the Act.

4. The Trustee may employ suitable agents and counsel and pay their reasonable expenses and reasonable compensation, including brokerage fees.

5. The Grantor shall pay the Trustee reasonable compensation for his services hereunder and shall reimburse the Trustee for all expenses incurred by the Trustee. Such compensation and expenses shall be paid by the Grantor promptly upon receipt of Trustee's statement for same.

6. The trust estate shall be directly liable for the payment and satisfaction of all obligations and liabilities incurred by the Trustee in accordance with the terms hereof. Although the Trustee may be a party to any suit or proceeding to enforce such obligations and liabilities, the Trustee shall not be held to any personal liability on account thereof (except that arising from his or its gross negligence or willfull malfeasance), but shall be a party only insofar as is necessary to enable such obligation or liability to be enforced against the trust estate. All persons shall look solely to the trust estate for satisfaction of claims of any nature arising in connection with the trust.

Appendix B

7. This Agreement and the trust created hereby shall be construed, regulated and administered under the laws of the State of New Jersey and the Trustee shall be liable to account only in the courts of that State.

8. This Agreement may be executed in any number of counterparts, each one of which shall be deemed to be an original.

WILSHIRE OIL COMPANY OF TEXAS

By .....

TRUSTEE

By RICHARD J. HUGHES 12-31-80
Richard J. Hughes

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 81-1560

WILSHIRE OIL COMPANY OF TEXAS,

Petitioner

vs.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Respondent

ON PETITION FOR REVIEW FROM A DECISION OF THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

Present:

ADAMS, VAN DUSEN and SLOVITER,

Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the Board of Governors of the Federal Reserve System and was argued by counsel on October 26, 1981.

On consideration whereof, it is now here ordered and adjudged by this Court that the said petition for review, be, and the same is hereby denied and the order of the said Board entered April 2, 1981, be, and the same is hereby affirmed. Costs taxed against petitioner.

ATTEST:

/s/ M. ELIZABETH FERGUSON
Chief Deputy Clerk

December 31, 1981

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 81-1560

WILSHIRE OIL COMPANY OF TEXAS,
Petitioner

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
Respondent

SUR PETITION FOR REHEARING
EN BANC

Present:

SEITZ,
Chief Judge,
ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and VAN DUSEN,
Circuit Judges.

The petition for rehearing filed by Petitioner in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ ARLIN M. ADAMS
Circuit Judge

Dated: February 1, 1982

Supplemental Brief

Supreme Court, U.S.
FILED
APR 13 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1749

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

WILSHIRE OIL COMPANY OF TEXAS,
Petitioner,

v.

BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S SUPPLEMENTAL BRIEF REGARDING THE BOARD'S DECISION IN *FIRST BANCORPORATION*

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KOHL, FISHER & BOYLAN
Of Counsel

April 13, 1982

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1749

WILSHIRE OIL COMPANY OF TEXAS,

Petitioner,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S SUPPLEMENTAL BRIEF REGARDING THE BOARD'S DECISION IN *FIRST BANCORPORATION*

Petitioner Wilshire Oil Company of Texas ("Wilshire")* respectfully submits this supplemental brief pursuant to Rule 22.6, to call this Court's attention to a recent decision by the Respondent Board of Governors of the Federal Reserve System (the "Board") construing § 2(c) of the Bank Holding Company Act of 1956, as amended, (the "BHC Act"), 12 U.S.C. § 1841(c)—the principal statutory provision at issue in this case. The Board's decision,

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* See Wilshire's petition for certiorari, dated March 18, 1982, p. 3 n.* (hereinafter cited as "Pet.—") for the listing required by Rule 28.1.

in a case entitled *First Bancorporation,* is reprinted as an addendum to this brief (a1-a8).*

In *First Bancorporation,* the Board relies primarily on the court of appeals' opinion in this case** to rule that institutions which offer negotiable order of withdrawal ("NOW") accounts and engage in the business of making commercial loans are henceforth to be considered "banks" under § 2(c) of the BHC Act (a4). Because these criteria would be satisfied by virtually every depository institution in the United States—including thousands of institutions that have never been deemed "banks" under the BHC Act—the Board's recent decision dramatically underscores the need for this Court to settle the questions presented by Wilshire's petition in order to prevent chaos in the administration of the Bank Holding Company Act, and consequent disruption of the financial industry, which otherwise will result.

The central question presented by this case is a straightforward issue of statutory construction and institutional competence: whether Congress' definition of "bank" in § 2(c) of the BHC Act, and in particular the unambiguous language of § 2(c)(1), may be ignored or rewritten by a court or an agency. Section 2(c)(1) excludes from the definition of "bank" any institution which does not accept "deposits that the depositor has a legal right to withdraw on demand," 12 U.S.C. § 1841(c)(1). The court of appeals apparently concluded that Congress did not "mean" to enact that language, and then proceeded to rewrite the

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* The Board's decision is dated March 12, but has not been published in the *Federal Register* or the *Federal Reserve Bulletin.* Wilshire first became aware of the decision through an article appearing in the March 31, 1982 edition of the *American Banker* (page 1, col. 4).

** The court of appeals' opinion (reprinted in Pet. 1a-19a), is now reported at 668 F.2d 732 (3d Cir. 1981).

statute to cover instead deposits that "in practice" are withdrawn on demand, *see* 668 F.2d at 736-38 (*reprinted in* Pet. 10a-14a). However, as Wilshire's petition for certiorari pointed out, the court of appeals' "in practice" amendment to § 2(c)(1) would encompass almost all depository institutions of any kind, most of which also engage "in the business of making commercial loans," BHC Act § 2(c)(2), and which therefore would be "banks" under the reasoning of the decision below. (*See* Pet. 16-17).

The Board's *First Bancorporation* decision confirms the broad impact of the court of appeals' decision and thus demonstrates a compelling reason for granting the writ. By radically expanding the coverage of § 2(c)(1), the opinion below creates a state of confusion in the application of the entire BHC Act, and thereby imposes an intolerable burden of uncertainty on major segments of the financial industry, whose status under the Act now has been drawn into question. (*See* Pet. 7-9, 14-17).

First Bancorporation involved an application by an existing bank holding company under § 4 of the BHC Act (which deals with "nonbanking" activities) for the Board's approval of an acquisition of a state-chartered industrial loan company, which was engaged in offering NOW accounts and in the business of making commercial loans. The Board approved the acquisition only on the condition, *inter alia*, that the acquired firm not continue to engage in both activities, in light of the Board's view that "[s]uch dual activity is not 'closely related to banking' but in fact is banking for purposes of the Bank Holding Company Act" (a4), and therefore could not be approved under § 4.*

* The Board also noted, however, that the acquisition could be effected under § 3 of the BHC Act, which deals with "bank" activi-

(footnote continued on following page)

The key aspect of the Board's reasoning in *First Bancorporation* was the same as that of the court of appeals in this case—that Congress did not "mean" what it said in § 2(c)(1) of the BHC Act. (*See* a3). On that basis, and on the view that NOW accounts are the functional equivalent of traditional checking accounts (*see* a3-a4), the Board concluded "that [the] offering of NOW accounts must be regarded as falling within the first part [§ 2(c)(1)] of the test of whether an institution is a 'bank' under section 2(c) of the [BHC] Act" (a4). A more radical departure from the statutory language would be difficult to imagine, because the principal distinction between a NOW account and a traditional checking account is precisely the distinction specified by the words of § 2(c)(1): while both are "transaction" accounts accessible by negotiable instrument,* the checking account depositor "has a legal right to withdraw on demand," while a NOW account depositor does not, because the depository institution has reserved, but ordinarily does not exercise "in practice," a right to prior notice of withdrawal. Yet, the Board's ruling in *First Bancorporation* follows directly from the court of appeals' opinion in

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(footnote continued from preceding page)

ties. (*See* a5 n.7). The standards of § 3 differ somewhat from those specified by § 4, most notably in § 3's stringent limitations on interstate acquisitions, *see* BHC Act § 3(d), 12 U.S.C. § 1842(d). *First Bancorporation* thus illustrates one of many instances in which the definition of "bank" has a significant effect not only on the scope of the BHC Act, but also on the applicability of the Act's various provisions.

* We note in passing that § 2(c)(1) says nothing about the method of withdrawal, as by a check or other negotiable instrument, but addresses only the time at which the depositor has a legal right to withdraw. Thus, the reasoning of the Board and the court of appeals is not confined to such "transaction" accounts, but appears to apply to any account—including every ordinary savings account in every financial institution in the United States—as to which the institution reserves, but does not "in practice" exercise, a right to prior notice of withdrawal.

this case, which necessarily rests on the proposition that the distinction so unambiguously prescribed by Congress can be flatly ignored by courts and agencies—which supposedly are charged with the duty faithfully to apply legislative commands.

Moreover, the Board in *First Bancorporation* steps out from behind a diversionary argument that apparently misled the court of appeals in this case. In the opinion below, the court of appeals erroneously relied upon the Board's contention that the interest or non-interest bearing nature of deposits provided some guidance to the interpretation of § 2(c)(1). *See* 668 F.2d at 736-37 & nn. 8, 9 (*reprinted in* Pet. 11a-12a).* But in *First Bancorporation* the Board drops this facade, and expressly recognizes that its disregard of § 2(c)(1)'s language applies equally to interest bearing and non-interest bearing accounts. (*See* a4 n.3).

The application of § 2(c)(1) to all NOW accounts has a vast impact on the financial industry, in light of the near-universal power to offer NOW accounts conferred by the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 132 (March 31, 1980) (the "1980 Deregulation Act").** Contrary to the Board's implication (*see* a4 n.5), however, that impact

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* This was plain error, both because § 2(c)(1) needs no "interpretation" and because nothing in any part of the BHC Act or its legislative history makes the slightest reference to the payment of interest on deposits (*see* Pet. 14-15 & 15 n.*).

** Indeed, the Board seems to suggest, in yet another deviation from its argument to the court of appeals in this case, that the 1980 Deregulation Act's provisions on NOW accounts somehow support, by implication, the disregard of the "legal right" distinction embodied in BHC Act § 2(c)(1) (*see* a3-a4). The truth is exactly the opposite: those provisions reinforce the viability of the distinction specified by § 2(c)(1)'s language, because Congress explicitly noted and legislated on the basis of that very distinction, which has been recognized in banking law and practice for decades (*see* Pet. 16).

is not mitigated by the "commercial loans" branch of the definition, because most depository institutions—including savings and loan associations, savings banks, and other types of "thrift institutions"—also are "engaged in the business of making commercial loans," BHC Act § 2(c)(2), as that clause has been applied by the Board (*see* Pet. 17 n.*).

As the *First Bancorporation* decision thus illustrates, the court of appeals' opinion in this case has cataclysmic implications for major segments of the financial industry that heretofore have been unaffected by the BHC Act. Just one of those segments—the savings and loan associations—includes between four and five *thousand* institutions whose status has now been thrown into question. Many of those institutions are owned or controlled by some of the nation's larger commercial and industrial firms—a partial listing includes such well-known firms as Sears, Roebuck & Co., Beatrice Foods Co., MCA, Inc., National Steel Corp., Berkshire Hathaway Inc., Baldwin-United Corp., Household Finance Corp., and Beneficial Corp.—and there are many others, engaged in a wide variety of businesses which are not permitted to holding companies under the BHC Act. The court of appeals' opinion in this case poses a serious threat to the continued operation of those firms as integrated businesses, and the immediacy of that threat is confirmed by the *First Bancorporation* decision.

This potential upheaval of the financial industry is as unnecessary as it is destructive, because it is solely the result of the refusal by the Board and the court of appeals in this case, in defiance of the decisions of this Court, to follow the precise definitional language actually enacted into law by Congress in § 2(c)(1) of the BHC Act, which contains none of the uncertainty that the Board and the court of appeals here have created. There is but one remaining factor

that can compel adherence to Congressional will, and prevent the unlimited and unlawful expansion of the Board's power set in motion by the court of appeals' decision from reaching fruition: the certiorari jurisdiction of this Court, which should be exercised to restore legality—indeed to restore basic rationality—to the administration of the BHC Act.

Conclusion

For the reasons stated above and in Wilshire's petition, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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Of Counsel

April 13, 1982

Appendix

ADDENDUM

FEDERAL RESERVE SYSTEM
FIRST BANCORPORATION

Order Conditionally Approving Acquisition of an Industrial Loan Company

First Bancorporation, Salt Lake City, Utah, a bank holding company within the meaning of the Bank Holding Company Act, has applied for the Board's approval under section 4(c)(8) of the Act (12 U.S.C. § 1843(c)(8)) and section 225.4(a) of the Board's Regulation Y (12 C.F.R. § 225.4(a)(2)) to acquire Beehive Financial Corporation ("Beehive Financial") and its wholly owned subsidiary, Beehive Thrift and Loan Company, Salt Lake City, Utah ("Beehive Thrift"), an industrial loan company. Applicant proposes to engage in lending, industrial loan, leasing and credit-related insurance activities. These activities have been determined by the Board to be closely related to banking. (12 C.F.R. §§ 225.4(a)(1), (2), (6)(a), and (9)(i)(a)). Industrial loan companies were recently authorized under Utah law to offer NOW accounts, and Applicant proposes to engage in this activity also.

Notice of the application, affording opportunity for interested persons to submit comments has been duly published (46 *Federal Register* 54801). The time for filing comments has expired, and the Board has considered the application and all comments received in light of the factors set forth in section 4 (c)(8) of the Act.

Applicant, the 31st largest banking organization in Utah, controls one bank with total deposits of approximately $14.7 million, representing less than 0.5 percent of the total deposits in commercial banks in that State and 0.5 per cent of deposits in the Salt Lake City banking market.[1]

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[1] Banking data are as of June 30, 1980.

Addendum

Beehive Financial and its subsidiary, Beehive Thrift, have consolidated assets of $3.3 million and liabilities of $2.8 million, including $2.3 million in deposits. In view of the size of the companies involved, the Board concludes that no adverse competitive effects would be associated with this proposal.

Under section 4(c)(8) of the Act, the Board is authorized to permit bank holding companies to acquire shares of any company the activities of which the Board has determined to be "so closely related to banking or managing or controlling banks as to be a proper incident thereto." In determining whether a particular activity is a proper incident to banking or managing or controlling banks, the Board is required to consider whether performance of the activity by a bank holding company can reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices.

The Board has previously determined that the activity of operating an industrial loan company in the manner authorized by State law is closely related to banking, "so long as the institution does not both accept demand deposits and make commercial loans." 12 C.F.R. § 225.4(a)(2). An institution engaging in both activities would be regarded as a "bank" for purposes of the Act. Section 2(c) of the Act defines as a "bank" any institution that "(1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans." 12 U.S.C. § 1841(c). The acquisition of a bank is subject to approval under section 3 of the Act rather than section 4.

Addendum

The offering of NOW accounts by an industrial loan company raises a question of whether an institution that offers such accounts and engages in the business of making commercial loans is a "bank" within the meaning of section 2(c) of the Bank Holding Company Act. Institutions that offer NOW accounts generally reserve the right to require 14-30 days' notice before permitting withdrawals from these accounts. The notice requirement is rarely invoked by institutions offering NOW accounts, however, and in practice the customer is permitted to withdraw funds on demand by check or draft. Indeed, for purposes of section 2(c), the Board believes that, until the institution invokes the notice requirement, the depositor has a right to withdraw funds on demand. Moreover, in giving meaning to the demand deposit portion of the definition of "bank", the court in *Wilshire Oil Company of Texas* v. *Board of Governors* (3d Cir. 1981) (filed December 31, 1981), ruled that in using the words "deposits that the depositor has a legal right to withdraw on demand," Congress was concerned with the substance rather than the form of the deposit. Slip Op. at 10-11.[2]

The legislative history of section 2(c) demonstrates that Congress viewed the ability to offer checking accounts as a critical factor in determining whether an institution is a commercial bank. In practice, NOW accounts are advertised as checking accounts and are used as such. Moreover, NOW accounts are regarded as "transaction accounts" under the Depository Institutions Deregulation and Monetary

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[2] Similarly, in *First National Bank in Plant City* v. *Dickinson*, 396 U.S. 122, 136 (1968), the Supreme Court held that for purposes of branch banking laws legal rights between private parties are not necessarily decisive in determining whether a deposit has been created when it is clear that the practical effect of a transaction is the receipt of a deposit.

Control Act of 1980 (Pub. Law No. 96-221; 94 Stat. 132) and, whether offered by commercial banks or thrift institutions such as savings and loan associations, are subject to the reserve requirement ratios that apply to demand deposits. 12 U.S.C. § 461. By subjecting NOW accounts to transaction account reserve requirements, Congress recognized that NOW accounts are checking accounts.[3] In view of the function, substance and attributes of NOW accounts, Congress' treatment of NOW accounts, and the potential for evasion of the Act associated with NOW accounts,[4] the Board has determined that offering of NOW accounts must be regarded as falling within the first part of the test of whether an institution is a "bank" under section 2(c) of the Act.

Accordingly, a *nonbanking* subsidiary of a bank holding company may not offer NOW accounts and also engage in the business of making commercial loans.[5] Such dual activity is not "closely related to banking" but in fact is banking for purposes of the Bank Holding Company Act. Thus,

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[3] In authorizing NOW accounts, Congress clearly intended to permit the payment of interest on such accounts, notwithstanding the general prohibition on the payment of interest on demand deposits. However, there is no indication that by authorizing the offering of NOW accounts Congress intended to exempt institutions that provide such accounts from the definition of "bank" in the Bank Holding Company Act.

[4] Since NOW accounts generally perform the same function as demand deposits, an institution seeking to evade the Act might attempt to use such accounts as a substitute for demand deposits. *See Wilshire Oil, supra.*

[5] Although savings and loan associations and savings banks also offer NOW accounts, their lending activities historically have been concentrated in home mortgages and their commercial lending activities are generally quite limited. This and other facts persuade the Board that the activities of such institutions presently authorized by federal statute law generally do not constitute engaging in the business of making commercial loans and that such institutions are not "banks" for purposes of the Act.

the Board regards any industrial banking institution that both offers NOW accounts and engages in the business of making commercial loans as a "bank" for purposes of the Bank Holding Company Act.[6] An application to acquire such an institution is subject to approval under section 3 of the Act rather than section 4. Thus, the subject application under section 4 of the Act may be approved only on the condition that Beehive Thrift will not both offer NOW accounts and engage in the business of making commercial loans.[7]

An industrial bank acquired under section 4 of the Act may, however, offer NOW accounts (provided that it also does not engage in the business of making commercial loans) because that activity is closely related to banking since banks in fact offer NOW accounts.[8] Before the Board may permit a bank holding company to engage in a closely related activity, however, the Board must also determine that the activity can reasonably be expected to produce public benefits that outweigh possible adverse effects. The Board is concerned that, unless the NOW accounts offered by Beehive Thrift are subject to interest rate limitations and reserve requirements that apply when such accounts are offered by commercial banks or savings and loan associa-

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[6] Beehive Thrift devotes a substantial portion of its assets to general commercial loans and is engaged in the business of making commercial loans within the meaning of the Act.

[7] However, if Beehive Thrift secured FDIC insurance, as is required by section 3(e) of the Act, Applicant could acquire Beehive Thrift under section 3 of the Act, and Beehive Thrift could both offer NOW accounts and make commercial loans under such circumstances.

[8] The Board's previous approvals of bank holding company applications to acquire industrial banking institutions did not authorize the offering of NOW accounts or other types of transaction accounts (such as automatic transfer accounts) by such institutions since those applications did not reference such accounts.

tions, the offering of NOW accounts by an industrial loan company subsidiary of a bank holding company can, and is likely to, undermine the important public policy objectives of the Depository Institutions Deregulation and Monetary Control Act of 1980. In that Act, Congress established a policy that all transaction accounts at depository institutions should be subject to interest rate ceilings and reserve requirements.[9]

The Board regards the offering of NOW accounts that are not subject to interest rate ceilings and reserve requirements as an adverse effect within the meaning of § 4(c)(8) of the Bank Holding Company Act, and concludes that it outweighs the public benefits offered by the proposal, which are discussed below.[10] Accordingly, the proposal will be approved only if the NOW accounts offered by Applicant are subject to the same federal interest rate limitations and reserve requirements that apply to a federally insured depository institution.

Consummation of the proposal may be expected to result in public benefits in the form of expanded services at Beehive Thrift and, if the proposal is modified as indicated above, would not result in any undue concentration of resources, conflicts of interests, unsound banking practices, or other adverse effects.[11]

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[9] The Board believes that the ownership by bank holding companies of industrial loan institutions that offer NOW accounts could undermine the Act's objectives by encouraging the growth of transaction deposits at such institutions and diverting deposits away from institutions that are subject to Regulations D and Q.

[10] The Board expressly reserves judgment as to whether more compelling public benefits might be sufficient to outweigh this adverse effect.

[11] In determining that the offering of NOW accounts is a permissible bank holding company activity subject to the conditions speci-

(footnote continued on following page)

Addendum

Accordingly, based upon the foregoing and all the facts of record, the Board has determined that the balance of public interest factors that the Board is required to consider under section 4(c)(8) is favorable, provided that Applicant complies with the following limitations: Applicant, through Beehive, may not both offer NOW accounts and engage in the business of making commercial loans. If Applicant does not engage in the business of making commercial loans, but does offer NOW accounts, such accounts will be subject to the same interest rate limitations and reserve requirements that would apply to a federally insured depository institution.

Accordingly, the application is hereby approved as conditioned herein. This determination is also subject to the conditions set forth in § 225.4(c) of Regulation Y and to the Board's authority to require such modification or termination of the activities of a holding company or any of its subsidiaries as the Board finds necessary to assure compliance with the provisions and purposes of the Act and the Board's regulations and orders issued thereunder, or to prevent evasion thereof.

The activities shall be commenced not later than three months after the effective date of this Order, unless such period is extended for good cause by the Board or by the

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(footnote continued from preceding page)

fied herein, the Board has taken into consideration the State regulation applicable to industrial loan companies in Utah. The Board notes that Utah law provides for insurance of NOW accounts up to $10,000, establishes minimum capital and reserve requirements for industrial loan companies, and limits the amount of funds that may be loaned to any one borrower. Moreover, the bank commissioner is authorized to monitor the affairs of industrial loan companies in order to ensure the safety of the deposits accepted by such institutions. The Commissioner is also empowered to limit the investments of industrial loan companies, and may issue orders to enforce such determinations.

Addendum

Federal Reserve Bank of San Francisco pursuant to delegated authority.

By order of the Board of Governors,[12] effective March 12, 1982.

(signed) JAMES MCAFEE

. . . . . .

James McAfee
Associate Secretary of the Board

[SEAL]

[12] Voting for this action: Chairman Volcker and Governors Wallich, Partee, Teeters and Rice. Absent and not voting: Governor Gramley.

Opposition

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No. 81-1749

In the Supreme Court of the United States

OCTOBER TERM, 1981

WILSHIRE OIL COMPANY OF TEXAS, PETITIONER

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's subsidiary is a "bank" as defined in Section 2(c) of the Bank Holding Company Act of 1956, 12 U.S.C. 1841(c).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 668 F. 2d 732. The decision and order of the Board of Governors of the Federal Reserve System (Pet. App. 20a-39a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 31, 1981 (Pet. App. 59a). A petition for rehearing was denied on February 1, 1982 (Pet. App. 60a). The petition for a writ of certiorari was filed on March 18, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Sections 2(c) and 5(b) of the Bank Holding Company Act of 1956, 12 U.S.C. 1841(c) and 1844(b), are set out at Pet. 2.

STATEMENT

1. The Bank Holding Company Act of 1956 was enacted to prevent the concentration of control of commercial bank resources and to separate banking and nonbanking enterprises. See *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 46 (1980). For purposes of the Act, any company that controls a bank is a bank holding company. 12 U.S.C. 1841(a)(1). Section 4 of the Act generally prohibits a bank holding company from engaging, either directly or through a subsidiary, in functions other than (1) controlling banks and (2) conducting certain nonbank activities found by the Federal Reserve Board to be permissible for bank holding companies. 12 U.S.C. 1843.

Until 1970, a company was deemed to be a bank holding company under the Act only if it controlled two or more banks. 70 Stat. 133. The Bank Holding Company Act Amendments of 1970 broadened the definition to include any company that controlled even a single bank. 84 Stat. 1760. These new one-bank holding companies were given ten years (until December 31, 1980) to comply with the Act by divesting themselves of either their bank or their impermissible nonbanking subsidiaries. 12 U.S.C. 1843(a)(2).

2. Petitioner is engaged in exploration for and production of crude oil and natural gas, as well as other natural resources, the leasing of mining, oil, and similar properties, and real estate development, all of which are prohibited for bank holding companies (A. 489).[1] Petitioner owns 90% of the Trust Company of New Jersey, a company organized as a bank under the laws of the State of New Jersey in 1899. Since it was organized, Trust Company has operated as a commercial bank; it has 18 branches in northern New Jersey (A. 129-133), and its deposits are insured by the Federal

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[1] "A." refers to the appendix filed in the court of appeals.

Deposit Insurance Corporation (A. 489). Under New Jersey banking law, Trust Company is authorized to make secured and unsecured loans (N.J. Stat. Ann. § 17:9A-25(7) (West Cum. Supp. 1981)), and to receive demand as well as savings and time deposits (N.J. Stat. Ann. § 17:9A-25(4) (West Cum. Supp. 1981)).[2] On December 31, 1980, Trust Company reported total commercial and industrial loans outstanding of $89,067,000 (A. 480), and deposits of $548,970,000, including demand deposits of $113,720,000 (A. 479).

3. As a consequence of its control of Trust Company, petitioner became a bank holding company on December 31, 1970, under the Act as amended. Petitioner registered with the Board as a bank holding company (A. 489), but failed to divest either its bank or nonbank activities. As December 31, 1980, approached, the Board began urging affected one-bank holding companies to develop and implement plans to achieve timely compliance with the divestiture requirements of the Act (Pet. App. 22a-24a). The Board and the Federal Reserve Bank of New York both specifically requested petitioner to develop a plan for compliance with the divestiture requirements of the Act (see A. 402-475).

On November 3, 1980, petitioner advised the Board that it intended to retain control of Trust Company and its impermissible nonbanking interests (A. 288-289). Petitioner stated that Trust Company would cease to be a "bank," as defined in the Act, if Trust Company reserved the right to require notice before withdrawal from "former demand deposit accounts" (A. 288). Two days later, the bank mailed the following notice to its individual and corporate demand deposit customers (Pet. App. 5a; A. 294):

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[2]Savings and time deposits are not at issue in this case.

> The Trust Company of New Jersey, beginning November 20, 1980 reserves the right to require 14 days notice prior to withdrawal from its transactional accounts. The Trust Company has never exercised its right to require notice and has no intention of exercising a notice provision on any type of account.

No change in Trust Company's operations was contemplated; none was effected.

4. The Board advised petitioner that Trust Company's notice of reservation of the right to require notice of withdrawal was insufficient to affect Trust Company's status as a "bank" under the Act (A. 295, 239-242; see also *id.* at 289). On December 9, 1980, the Board initiated proceedings to require petitioner to comply with the Act. 12 U.S.C. 1818(b)(1) and (3). See A. 1-10, 14-26. Petitioner waived its right to a hearing, and the matter was considered by the Board on the record and briefs (Pet. App. 21a). The Board concluded that Trust Company remained a "bank," as defined in the Act, notwithstanding its "reservation" of the power to require notice before withdrawal from demand deposit accounts (Pet. App. 20a-39a).

The court of appeals affirmed (Pet. App. 1a-19a), explaining that, in defining the term "bank" for purposes of the Act, Congress' concern was the substance of the relationship between the institution and its customers. The court agreed with the Board that Trust Company's reservation had no material effect on the legal status or character of the bank's demand deposit accounts. Since petitioner's actions clearly constituted an attempt to evade the requirements of the Act, the court found that Section 5(b) expressly authorized the Board to order compliance.

ARGUMENT

Petitioner's only submission is that its bank subsidiary ceased to be a "bank" within the meaning of the Bank

Holding Company Act because the bank notified its "former" demand deposit account customers that it reserved the right to require notice before any withdrawal, although the bank had no intention of exercising that right and effected no change in any of its banking operations. That contention is without merit. Moreover, no other court of appeals has had occasion to consider such a transparent attempt to circumvent the divestiture requirements of the Act and, therefore, there is no conflict among the courts of appeals on the issue presented in this case.[3] Accordingly, review by this Court is unwarranted.

1. For purposes of the Bank Holding Company Act, a "bank" is "any institution * * * which (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans" (12 U.S.C. 1841(c)). The Trust Company is organized and operates as a commercial bank; it is authorized by law and by its articles of incorporation to accept deposits that the depositor has a right to withdraw on demand and to make commercial loans. There appears to be no dispute that Trust Company accepted demand deposits and made commercial loans from 1899 to 1980 and, therefore, was a "bank," as defined in the Act. The only "change" that

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[3]Of the 1450 companies that became bank holding companies under the 1970 amendments to the Act, 472 were engaged in impermissible nonbanking activities. *67th Annual Report, Board of Governors of the Federal Reserve System* 227 (1980). Petitioner is the only one-bank holding company that failed to comply with the requirements of the Act. *Ibid.* Seventy nine companies complied with the Act by disposing of their bank subsidiaries (*ibid.*; see, *e.g.*, *CIT Corp.*, 65 Fed. Res. Bull. 440 (1979)); others disposed of their impermissible nonbank subsidiaries, see, *e.g.*, *Citicorp*, 66 Fed. Res. Bull. 587 (1980); *NCNB Corp.*, 65 Fed. Res. Bull. 573 (1979); *Northwestern Financial Corp.*, 65 Fed. Res. Bull. 168 (1979)). Others were exempt from the divestiture requirements under the grandfather provision of Section 4(a)(2) of the Act.

occurred in 1980 was Trust Company's assertion of a "right" that it had "no intention of exercising." Trust Company's banking business remained unchanged. Indeed, the only reason for asserting the right was to circumvent the requirements of the Bank Holding Company Act, permitting petitioner and Trust Company to carry on their respective activities without change.

There is no basis for interpreting Section 2(c) of the Act (12 U.S.C. 1841(c)) to require the Board to accept such arid formalism, especially when Congress has specifically authorized the Board "to issue such regulations *and orders* as may be necessary to * * * carry out the purposes of [the Act] * * * *and prevent evasions thereof*" (12 U.S.C. 1844(b); emphasis added). See *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 370-371 (1973); *Gemsco, Inc.* v. *Walling*, 324 U.S. 244 (1945).[4] Moreover, the history of Section 2(c) makes it plain that in defining the term "bank" Congress intended to cover commercial banks like Trust Company, which accept checking account deposits and make commercial loans. As noted above, the primary purposes of the Bank Holding Company Act were to prevent concentration of control of commercial credit and to separate commercial banking from nonbanking activities. See S. Rep. No. 1095, 84th Cong., 1st Sess. 2 (1955); H.R. Rep. No. 609, 84th Cong., 1st Sess. 2, 14-17 (1955); S. Rep. No. 1179, 89th Cong., 2d Sess. 7 (1966). Congress understood the term "commercial bank" to comprise banking institutions that accepted checking account deposits and made commercial loans. See, *e.g.*, S. Rep. No. 1179, *supra*, at 7; S.

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[4]Congress' directive to the Board to adopt orders to prevent evasions of the Act gives added force to the traditional principle that interpretations of a statute by the agency charged with its enforcement are entitled to "great respect." See, *e.g.*, *Board of Governors of the Federal Reserve System* v. *First Lincolnwood Corp.*, 439 U.S. 234, 248, 251 (1978).

Rep. No. 91-1084, 91st Cong., 2d Sess. 24 (1970).[5] Accepting petitioner's construction of Section 2(c), therefore, would effectively defeat the purpose of that provision and of the Bank Holding Company Act as a whole.

2. Petitioner contends (Pet. 15-17; Supplemental Br. 3-6) that the holding of the court of appeals indicates that any institution that (1) makes commercial loans and (2) accepts deposits that are in practical effect withdrawable without prior notice, are "banks" within the meaning of Section 2(c). According to petitioner (Pet. 16), "few, if any, depository institutions in the United States * * * would not be considered 'banks' under the * * * Act," as construed by the court of appeals. Petitioner's extravagant reading of the decision of the court below simply ignores the facts of this case. Trust Company of New Jersey is now and, as far as the record reveals, since 1899 has been engaged in commercial banking, offering commercial loans and accepting checking account deposits. The only change that occurred in 1980 was the bank's announcement of a "right" it had "no intention of exercising." The nature of its banking business remained the same. The court of appeals simply sustained the Board's reasonable conclusion that a commercial bank does not cease to be a "bank" within the meaning of Section 2(c) of the Bank Holding Company Act by reserving the right to require its checking account customers to give 14 days notice of any withdrawal, when (1) there is no change

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[5]In the 1956 legislation, the term "bank" was broadly defined to include (70 Stat. 133) "any national banking association or any State bank, savings bank, or trust company." Following the Board's recommendation, Congress amended the Act in 1966 to define "bank" as (S. Rep. No. 1179, *supra*, at 7) "an institution that accepts deposits payable on demand (checking accounts), the commonly accepted test of whether an institution is a commercial bank so as to exclude institutions like industrial banks and nondeposit trust companies." In 1970, again following the advice of the Board, Congress amended the Act (S. Rep. No. 91-1084, *supra*, at 24) to "exclude institutions that are not engaged in the business of making commercial loans from the definition of 'bank'."

in the bank's operations; (2) the bank has no intention of exercising the right; and (3) the *only* purpose of the reservation of the right to require notice is to evade the Bank Holding Company Act.[6]

Contrary to petitioner's repeated assertions (see, *e.g.*, Pet. 16; Supplemental Br. 4-5, 6-7), nothing in the decision of either the Board or the court of appeals in this case indicates that any legitimate savings and loan association or savings bank would be considered a "bank" within the meaning of Section 2(c) of the Bank Holding Company Act. Indeed, the Board recently pointed out that "the activities of such institutions presently authorized by federal statute law generally do not constitute engaging in the business of making commercial loans *and that such institutions are not 'banks' for purposes of the [Bank Holding Company] Act*" (Supplemental Br. App. a4 n.5; emphasis added).[7]

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[6]The Gulf & Western Company transaction described by petitioner (Pet. 4-5 n.**) only underscores the point. Gulf & Western's subsidiary disposed of its commercial loans and agreed to abstain from all commercial lending, effecting a substantive change in the nature of its business that took it outside the scope of Section 2(c) and the area of Congress' concern. Trust Company, on the other hand, effected no change in the nature of its business and intended none.

[7]Similarly, petitioner's reliance on *First Bancorporation* (Supplemental Br. App. a1-a8) is wholly misplaced. In *First Bancorporation*, the Board conditionally approved a bank holding company's acquisition of an industrial loan company under Section 4(c)(8) of the Act (12 U.S.C. 1843(c)(8)). The Board noted, however, that if the industrial loan company both offered negotiable order of withdrawal ("NOW") accounts (*i.e.*, interest bearing checking accounts) and engaged in the business of making commercial loans, it would be a "bank" within the meaning of the Act. Acquisition of a "bank" is subject to regulation by the Board under Section 3 of the Act (12 U.S.C. 1842). Accordingly, the Board approved the acquisition under Section 4 of the Act (12 U.S.C. 1843) only on condition that the industrial loan company not offer both NOW accounts and commercial loans. Whatever the grounds for the Board's conclusion that offering NOW accounts and engaging in the business of making commercial loans would make an industrial loan

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1982

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company a "bank" within the meaning of Section 2(c), *First Bancorporation* does not involve the question whether an institution that has operated as a commercial bank for more than 80 years remains a bank under the Act, when it reserves the right to require checking account customers to give notice of withdrawal but has no intention of exercising the right and has no purpose for announcing that "right" other than to evade the Act.

Petitioner's Reply Brief

No. 81-1749

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S REPLY BRIEF

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June 17, 1982

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PETITIONER'S REPLY BRIEF

The Board's brief in opposition seeks to obscure the fundamental nature and importance of the pure questions of law starkly presented here for review, and the broad and destructive impact of the decision below on the law and the economy.

The legal issues presented that warrant review are (i) the scope of the Bank Holding Act, as established by its definition of "bank" in § 2(c), and (ii) the Board's lack of authority to reject explicit statutory language in favor of its own notions of regulatory objectives. The court below acquiesced in the Board's assumption of the power to excise § 2(c)(1)'s principal operative phrase—"legal right". The Board now has used this new power in two highly contro-

versial decisions, *see First Bancorporation,* 68 Fed. Res. Bull. 253 (March 12, 1982), *petition for review filed,* No. 82-1401 (10th Cir. April 9, 1982); *Interstate Financial Corp.,* 68 Fed. Res. Bull. 316 (April 4, 1982), to create a new regulatory edifice that places in doubt the status under the Act of thousands of depository institutions that both make commercial loans and offer transaction accounts.

Thus, the court below has authorized, and the Board eagerly has executed, a new program of extra-congressional "reform" that threatens Congress's legislative supremacy and has disrupted, and will continue to disrupt the nation's financial community. This Court can and should restrain these broad and destructive effects.

I.

The Board's Brief Ignores the Purely Legal Nature and Fundamental Importance of the Questions Presented.

A. Despite the Board's feints to the contrary (Opp. 5),* there is no issue in this case concerning the Act's divestiture provision—§ 4(a)(2)—or its application. Rather, the principal statutory provision at issue is § 2(c)'s definition of "bank", which is central to the administration of the Act because it both defines the basic scope of the Act and distinguishes the application of the Act's two major substantive sections (*see* Pet. 8-9 & 9 n.*).

The simple principle of law controlling this case is that the plain and unambiguous language of a statute must be applied as written, a result this Court repeatedly has reached in a large and growing body of case law** that was ignored

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* Brief in Opposition, hereinafter "Opp."; Petition, hereinafter "Pet."

** *See e.g. Schweiker* v. *Wilson,* 450 U.S. 221 (1981) and cases cited at Pet. 9-13.

completely by the court of appeals and the Board. The principle of these cases is not an "arid formalism" (Opp. 6) or merely a rule of statutory construction, but a necessary corollary to the constitutional separation of powers: the legislative supremacy of Congress requires strict judicial and administrative adherence to precise statutory language; to hold otherwise, as did the decisions below, is to deprive Congress of its legislative powers. Constitutional norms prohibit the Board from disregarding § 2(c)'s language whenever and however it chooses.

The basic question in this case requires the construction of specific statutory language, and nothing else. The nature of the question is such that the Court's consideration of it will not be aided by additional litigation in lower courts, such as *First Bancorporation,* now pending in the Tenth Circuit.* The question is now ripe for review by the Court. The issue will not change: whether precise statutory language—"deposits as to which the depositor has a legal right to withdraw on demand"—means what it plainly says and limits by its terms the authority delegated to an agency by Congress. If such language is inadequate to the task of restricting an agency's authority, no language is equal to that task and Congress has been stripped of its legislative supremacy.

B. In an attempt to overcome these constitutional principles, the Board argues (1) that TCNJ historically has been a "commercial bank" that did not "change" its operations sufficiently to suit the Board, and (2) that the court of appeals "ruled" that TCNJ's reservation of the prior

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* Should this Court decide review of this case would be premature prior to the Tenth Circuit's disposition of *First Bancorporation,* action on Wilshire's petition for certiorari may be stayed pending possible consolidation of these actions before this Court. *See, e.g., Tidewater Oil Co.* v. *United States,* 409 U.S. 151 (1972).

notice right "had no material effect on the legal status or character" of its accounts, but (3) in any event, § 5(b) of the Act allows the Board to reject the "arid formalism" of the clear Congressional command embodied in § 2(c)(1), in order to deal with this supposed "evasion." Each of these points is irrelevant and demonstrably wrong.

1. The Board rests much of its argument on contentions that TCNJ since 1899 has been organized and operating as a commercial bank. (Opp. 5, 7). These contentions are wrong as a matter of law and fact* and were not relied upon by the court below. Moreover this entire line of argument misses the point. The Act's definition of "bank" bears no relation to historical classification or practice.

It is totally irrelevant whether TCNJ had been in the commercial banking business for 80 years, or is a *de novo* banking institution. The legal question is the same.** If TCNJ does offer accounts from which a depositor has a legal right to withdraw on demand, it is a bank. If TCNJ does not offer such accounts, it is not a bank. Congress was free to adopt any of those standards urged and now applied by the Board, but Congress chose not to—and the Board is not empowered to reverse this Congressional judgment.

2. The Board further seeks to limit the issues presented by this case by misconstruing the lower court's decision as based upon a purported ruling that the "trust company's reservation had no material effect on the legal status or

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* The Board has not cited, and we have not located, any federal or New Jersey banking statute that defines or uses the term "commercial bank"; and the Board's counsel could cite no support in the record for these contentions (Tr. of Oral Arg., October 26, 1981, pp. 9-10).

** Presumably it was irrelevant whether the bank acquired by Gulf & Western (*see* Opp. 8 n.6) had been in business for many years or had recently opened when it successfully avoided status as a bank.

character of the bank's demand deposit accounts." (Opp. 4) The court below expressly disclaimed such a ruling: "We do not need to decide, however, if the Board was correct in its conclusion that TCNJ's depositors still have a legal right to withdraw their funds on demand." 668 F.2d 732, 735. Moreover, any such ruling would be erroneous as a matter of law, and in conflict with the law of several states.*

3. The Board sidles away from the primary issue by substituting its § 5(b) argument for analysis of § 2(c)(1)'s language (*see* Opp. 6). This argument turns the judicial process upside down. A court cannot decide that a statute has been "evaded" without first deciding what that statute means. At most, § 5(b) permits prospective, prophylactic measures of general applicability, and does not license the Board to redefine the scope of the Act by a series of *ad hoc* orders.** The cases cited by the Board (Opp. 6) recognize these principles. *See Mourning* v.

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* The New York Court of Appeals recently recognized that an institution's practice of ordinarily not requiring notice does not affect its legal right to do so. *See Le Bovici* v. *Jamaica Savings Bank*, 56 N.Y.2d 522, 524 (1982). Established state case law regarding NOW accounts, *Wisconsin Bankers Ass'n* v. *Mutual Savings and Loan Ass'n*, 291 N.W.2d 869 (Wis. 1980), *mod.*, 307 N.W.2d 180 (1981); *Washington Bankers Ass'n* v. *Washington Mutual Savings Bank*, 598 P.2d 719 (Wash. 1979); *Pennsylvania Bankers Ass'n* v. *Secretary of Banking*, 392 A.2d 1319 (Pa. 1978); *Consumer Savings Bank* v. *Commissioner of Banks*, 282 N.E.2d 416 (Mass. 1972); *Savings Bank* v. *Bank Commissioner*, 237 A.2d 45 (Md. 1968), and federal banking statutes and regulations, including statutes and regulations administered and promulgated by the Board itself, *see* 12 U.S.C. §§ 371a, 1464(b)(1), 1828(g), 1832(a)(1) (1976 & Supp. IV 1980); 12 C.F.R. parts 204, 217, & 329 (1981), support Wilshire's position that TCNJ depositors had no legally enforceable right to withdraw on demand.

** Other circuits have required strict adherence by the Board to the Act's precise definitional provisions, which circumscribe the Board's power. *Patagonia Corp.* v. *Board of Governors*, 517 F.2d 803 (9th Cir. 1975); *Western Bancshares* v. *Board of Governors*, 480 F.2d 749 (10th Cir. 1973).

Family Publications Service, Inc., 411 U.S. 356 (1973); *Gemsco, Inc.* v. *Walling*, 324 U.S. 244 (1945).*

Not only does the lower court's endorsement of the Board's application of § 5(b) destroy the structure of the Act and violate controlling authority, but, as expected (Pet. 8, 17, 18), has led to inevitable abuses. As a result of the Board's intervening rulings in *Interstate Financial* and *First Bancorporation* (see Point II, *infra*), the offering of NOW accounts—a legitimate business practice engaged in by most depository institutions under authority granted by Congress (Pet. 16)—suddenly has been declared by the Board** to be wholesale "evasion" of the Act.

II.

This Court's Prompt Review and Reversal of the Decision Below Is Necessary to Prevent a Serious Adverse Impact on the Law and the Economy, Which Already Has Begun.

Wilshire's petition cautioned that the court of appeals' decision "has invented a new rule that would render virtually every depository institution in the Unted States a 'bank' under the BHC Act" and therefore " is a prescription

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* These cases involved generally applicable regulations promulgated under enabling provisions that, unlike § 5(b), expressly conferred extraordinary definitional powers. 411 U.S. at 361; 324 U.S. at 248. *Gemsco* recognized that general enabling provisions are subordinate to express limitations elsewhere in a statute, 324 U.S. at 255—precisely the limitation that § 2(c) must be on § 5(b) if § 2(c) is to be given any effect at all (*see* Pet. 18-20).

** The Board's *First Bancorporation* ruling that all NOW accounts fell within § 2(c)(1) was based materially on the notion that there was "the potential for evasion of the Act associated with NOW accounts . . . [b]ecause NOW accounts generally perform the same function as demand deposits, [and therefore] an institution seeking to evade the Act might attempt to use such accounts as a substitute for demand deposits. *See Wilshire Oil, supra.*" 68 Fed. Res. Bull. at 254 n.4.

for business uncertainty, arbitrary administrative action, and faithlessness to Congressional will" (Pet. 8). The Board already has fulfilled this prophecy, through two recent decisions based on the lower court's decision in this case—*First Bancorporation* and *Interstate Financial*—that entirely destroy the Congressional definition of "bank" set forth in § 2(c).

Yet, in its submission to this Court, the Board denies that it has created a novel regulatory structure. Thus, the Board argues that Wilshire's reportage of these events is an "extravagant reading" of the decision below (Opp. 7), pretends that the effect of the court of appeals' opinion is confined to the purported facts of this case (Opp. 7-8; *see* Point I. B, *supra*), and offers assurances that the "thrift institution" segment of the industry is unaffected (Opp. 8).

These contentions, however, are belied by the Board's own words and rulings in *First Bancorporation* and *Interstate Financial*. The Board has rested squarely upon the opinion below to rule that institutions—including "thrift institutions"—that engage in the business of making commercial loans and offer NOW accounts are "banks" under § 2(c) of the Act.* And this occurred despite its earlier assurance: "nor would a finding that TCNJ con-

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* In *First Bancorporation* the Board stated:

> The notice requirement is rarely invoked by institutions offering NOW accounts, however, and in practice the customer is permitted to withdraw funds on demand by check or draft. Indeed, for purposes of section 2(c), the Board believes that, until the institution invokes the notice requirement, the depositor has a right to withdraw funds on demand. Moreover, in giving meaning to the demand deposit portion of the definition of "bank", the court in *Wilshire* . . . ruled that in using the words "deposit that the depositor has a legal right to withdraw on demand," Congress was concerned with the substance rather than the form of the deposit.

68 Fed. Res. Bull. at 253-54.

tinues to be a bank for purposes of the Act mean, as Wilshire claims, that thrift institutions would become banks under the act." (Pet. 38a n.20)

In *First Bancorporation*, the Board categorically ruled that all NOW accounts came within § 2(c)(1) of the BHC Act (*see Wilshire's* supplemental brief dated April 13, 1982, cited herein as "Supp. Br. —"). On the basis of this ruling, the Board concluded that an industrial loan company—generally considered a type of "thrift institution" and not a "commercial bank"*—was a "bank" under the Act. This conclusion was also applied to an existing subsidiary engaged in the same activities.

In *Interstate Financial*, the Board went one step further, and stated that a savings and loan association that offers NOW accounts, as virtually all do, and makes commercial loans in excess of those permitted for federal savings and loan associations, is a bank under the Act. 68 Fed. Res. Bull. at 316 n.1. This case, in effect granting a generic exemption to "legitimate" savings and loans (Opp. 8), creates yet another impermissible standard not found in the Act for defining "bank"—namely the type of charter held by an institution. This very criterion once defined the scope of the Act, but was abandoned in 1966 (Pet. at 20 n.* & n.**) in favor of the current language of § 2(c)(1), which depends solely upon the financial services provided by a depository institution.

Thus, the Board's position that "nothing in the decision of either the Board or the court of appeals in this case indicates that any legitimate savings and loan association or

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* The *First Bancorporation* ruling illustrates the Board's selective use of legislative history. The language destroyed by that ruling was enacted "to exclude institutions like industrial banks." S. Rep. No. 89-1179, 89th Cong., 2d Sess. 7 (1966).

savings bank would be considered a bank within the meaning of Section 2(c) of the Bank Holding Company Act," (Opp. 8), can only be maintained by sacrificing express Congressional commands and the equal application of the Act to all depository institutions.

The basic flaw in the Board's position is that it ignores the definitional approach of § 2(c), which uses precise technical language to define "bank" solely on the basis of the activities it provides—certain types of transaction accounts and commercial loans. If the institution in question does not engage in one of those activities, it is not a bank. All other factors and considerations upon which the Board relies are irrelevant.

This error is what has created confusion throughout the financial services industry, and requires redress by this Court. When an institution could rely on the clear words adopted by Congress, there was little difficulty in determining whether it was or was not a "bank" under the Act. When an institution must instead determine how to conduct its affairs in the face of subjective and frequently changing Board views, the inevitable result is institutional confusion and uncertainty on this crucial legal issue.

Indeed, absent a clear pronouncement by this Court in this case, many institutions will be forced by the Board to undertake actions which, like Wilshire's sale of TCNJ, will not later be reversible when this Court finally compels the Board to subordinate itself to the express will of Congress. If this opportunity promptly to review and correct the Board's actions is lost, judicial and economic resources will be squandered, and the uncertainty and confusion inflicted upon the depository industry will be prolonged. This Court can and should undertake now to curtail these broad-reaching and destructive effects.

CONCLUSION

For the reasons stated above and in Wilshire's petition and supplemental brief, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Third Circuit. In the alternative, this Court should defer consideration of Wilshire's petition pending the court of appeals' disposition of *First Bancorporation*, No. 82-1401 (10th Cir.), or immediately issue writs of certiorari to the United States Courts of Appeals for the Third and Tenth Circuits, and in either event set the cases for combined consideration by this Court.

Respectfully submitted,

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